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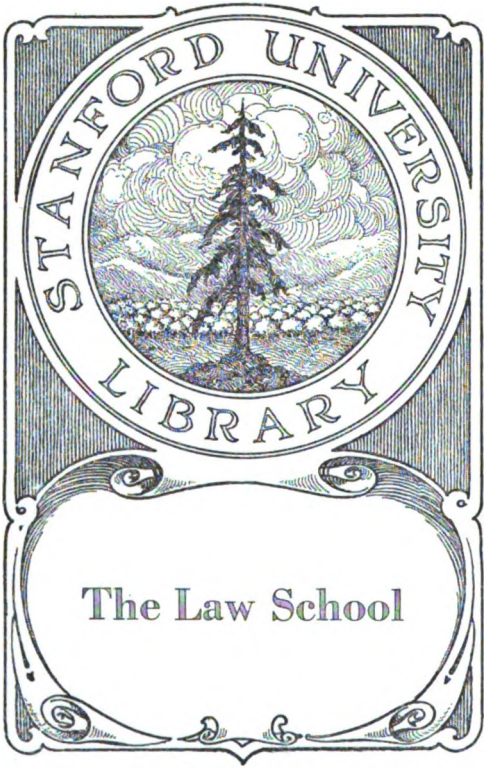

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THE

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DECIDED IN

THE COURT OF KING'S BENCH

AND

COURT OF APPEAL

FOR MANITOBA

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REPORTS OF CASES

DECIDED IN

THE COURT OF KING'S BENCH

AND

COURT OF APPEAL

FOR MANITOBA

COURT OF APPEAL

REX v. DOJACEK

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Intoxicating Liquors—The Manitoba Temperance Act, 6 Geo. V, Ch. 112, S. 2 (e)—Patent Medicine Containing More than 2½ Per Cent of Proof Spirits—"Drinkable Liquid"—Statutes, Construction Of.

The expression "drinkable liquids" used in the definition of "liquor" or "liquors" in subsec. (e) of sec. 2 of *The Manitoba Temperance Act*, 6 Geo. V, ch. 112, means liquids *suitable for drinking* and does not include all liquids capable of being swallowed. A patent medicine, therefore, although it contains 16 to 18 per cent of alcohol in volume, if it contains sufficient medication to prevent its use as an alcoholic beverage and no more alcohol than is necessary to keep its component parts in solution, is not a "drinkable liquid" within the meaning of the Act, and a conviction under sec. 49 of the Act for keeping it should be quashed.

Rex v. Maclean, (1918) 13 Alta. L.R. 244, [1918] 2 W.W.R. 154, followed.

DENNISTOUN, J.A. dissented, holding that the word "drinkable" means simply "capable of being drunk."

In ascertaining the meaning of an ambiguous expression in a statute, an earlier Act dealing with the same subject should be referred to and the same words "drinkable liquids" used in the repealed *Liquor License Act* had always been construed to include only intoxicating liquids suitable for drinking, having specially in view such alcoholic beverages as would be supplied to customers in a licensed hotel or sold in a shop licensed to sell liquors.

ARGUED: 28th April, 1919.

DECIDED: 23rd May, 1919.

Statement.

APPLICATION for *certiorari* to this Court to quash a conviction of the accused under *The Manitoba Temperance Act.*

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Judgment.

PERDUE, C.J.M.

The question involved was as to whether the patent medicine in question was a "liquor" under the terms of the Act. The conviction was set aside.

S. Hart Green, for the applicant.

W. Manahan, for the Crown.

PERDUE, C.J.M.—The accused was convicted under sec. 49 of *The Manitoba Temperance Act,* 6 Geo. V., ch. 112, by R. M. Noble, police magistrate, for that the accused "did unlawfully keep liquor in a place other than in a private dwelling-house in which he resides." The accused is the manager of the Ruthenian Booksellers & Publishers, Limited. This company is the distributing agent in Western Canada for the manufacturers of a patent medicine known as "Triner's American Elixir of Bitter Wine." The offence proved was that the accused had in the book store, which was not his place of residence, a quantity of this medicine in bottles. It is admitted that the liquid in question contains 16 to 18 per cent of alcohol in volume. It was shown that it also contained 18 grains per fluid ounce of cascara sagrada, said to be a strong laxative, besides some eight other drugs in lesser proportions. It was admitted by the prosecutor that this medicine is registered under *The Proprietary or Patent Medicine Act,* 7 & 8 Edw. VII., ch. 56 (D).

The magistrate has found on the evidence that the patent medicine in question

contains sufficient medication to prevent its use as an alcoholic beverage, and no more alcohol than is necessary to keep its component parts in solution.

But he also finds that it

is a liquor as defined in *The Manitoba Temperance Act,* as it contains over 2½% proof spirits, also that it is a drinkable liquid which is intoxicating.

Subsec. (*e*) of sec. 2 of *The Manitoba Temperance Act* is as follows:

The expression "liquor" or "liquors" shall include all fermented, spirituous and malt liquors, and all combinations of liquors, and all drinks and drinkable liquids which are intoxicating; and any liquor which contains more than two and a half per cent. (2½ per cent.) of proof spirits shall be conclusively deemed to be intoxicating.

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The definition is in effect the same as that contained in the old *Liquor License Act,* which was repealed by *The Manitoba Temperance Act;* See R.S.M., 1913, ch. 117, sec. 2, subsec. (*g*); except that the last clause of subsec. (*e*) of sec. 2 of *The Manitoba Temperance Act* commencing "and any liquor, etc." is not found in the corresponding subsection of *The Liquor License Act.* Taking the definition in *The Manitoba Temperance Act,* the medicine in question does not come within any of the terms "fermented," "spirituous," "malt liquors," and "combinations of liquors." It must therefore come under the expression "all drinks and drinkable liquids which are intoxicating," if the conviction is to be sustained. The evidence shows, and the magstirate has found, that the liquid in question is prevented from being used as a beverage by reason of its medication. It could not therefore be classed as a "drink." There remains the question, is it a "drinkable liquid" within the meaning of the Act? It appears to me that this case rests wholly upon the interpretation to be placed on this expression.

The word "drinkable" may mean capable of being drunk. In that case "drinkable liquids" would include all liquids, because a liquid, no matter how nauseous or deadly it may be, is capable of being drunk. The word "drinkable" would, if taken in that sense, be unnecessary, as "liquid" standing alone would be sufficient. But "drinkable" may also mean *suitable for drinking* and be synonymous with *potable,* using the word in the sense in which we speak of water as being drinkable or undrinkable, that is, fit or unfit for drinking. I have already referred to the meaning placed upon the words "liquor" or "liquors" in *The Liquor License Act.* They are there defined as meaning and comprehending "all spirituous and malt liquors, and all combinations of liquors and drinks and drinkable liquids, which are intoxicating." *The Liquor License Act* authorized the issue of licenses to sell the liquors defined in the Act. These liquors were drinkable liquids which were intoxicating and were sold as beverages. They were drinkable in the sense of being potable. Where, under the provisions of *The Liquor License Act,* local option was in force, no licenses for the sale of liquors were issued and a local prohibition pre-

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Judgment.

PERDUE, C.J.M.

vailed within the local option district. No sale of liquors, and therefore no drinks or drinkable liquids which were intoxicating could lawfully be sold within such a district. The clauses in *The Liquor License Act* relating to the prohibition of sales of liquor in local option districts very closely resemble, and in some respects are practically identical with, corresponding clauses in *The Manitoba Temperance Act*. The object of the local option clauses in the former Act was similar to that of the present Act. The former provided means for introducing local prohibition, the latter makes prohibition general throughout the province. The power of a province to pass local option prohibitions in regard to the sale of liquors was upheld by the Privy Council in *Atty.-Gen. for Ontario v. Atty.-Gen. for Canada* [1896] A.C. 348, 65 L.J.P.C. 26. Local option was aimed at suppressing the vice of intemperance in the consumption of alcoholic liquors in particular localities. *The Manitoba Temperance Act* is aimed at suppressing the same vice by making the prohibition general throughout the Province. This Act has been pronounced by the Privy Council to be within the powers of the Province to enact; *Atty.-Gen. of Manitoba v. Manitoba License-holders' Assn.* [1902] A.C. 73, 71 L.J. P.C. 28.

Provincial prohibition has been the natural outcome of provincial local option law. The power to locally prohibit, upheld in *Atty.-Gen. for Ontario v. Atty.-Gen. for Canada, supra,* was extended by the later Privy Council decision to a power to prohibit throughout the province. There is an intimate connection between the present law and the previous one. In ascertaining the meaning of an ambiguous expression in a statute an earlier Act dealing with the same subject should be referred to. Lord Mansfield thus stated the rule:

> Where there are different statutes in *pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other. *Rex v. Loxdale,* 1 Burr. 445 at p. 447.

The principle of interpretation stated by Lord Mansfield as above was fully approved by the Court of Appeal in *Goldsmiths Co. v. Wyatt,* 76 L.J.K.B. 169. See also *Rex v. Titterton, Ex parte Quelch* [1895] 2 Q.B, 61, at p. 67, 64 L.J.

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PERDUE, C.J.M.

M.C. 202. It is clear that the expression "drinks and drinkable liquids which are intoxicating," found in the definition of "liquor" or "liquors" in *The Liquor License Act,* meant intoxicating liquids suitable for drinking, having specially in view such alcoholic beverages as would be supplied to customers in a licensed hotel, or sold in a shop licensed to sell liquors. That being the meaning of the expression in question where it appeared in *The Liquor License Act,* the same meaning should be given to it in the present Act, which takes the place of the other in dealing with the subject of prohibition.

Going further back into the history of temperance legislation, we find that *The Temperance Act* of 1864, 27 & 28 Vict. ch. 18 (D), where in force , prohibited the sale of

any spirituous or other intoxicating liquor, or any other mixed liquor capable of being used as a beverage part of which is spirituous or otherwise intoxicating.

In *The Canada Temperance Act,* 1878, 41 Vict. ch. 16 (D) the prohibition is against the sale of

any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage and part of which is spirituous or otherwise intoxicating.

The Act of 1864 was intended to provide for the repression of abuses resulting from the sale of intoxicating liquors; See preamble. The Act of 1878 aimed at "promoting temperance and providing uniform legislation in all provinces respecting the traffic in intoxicating liquors." The intention of *The Manitoba Temperance Act* is to suppress the liquor traffic in that province by prohibiting provincial transactions in liquor: See preamble. It seems clear that all this legislation was aimed at preventing the excessive use of alcoholic liquors as beverages..

In the Alberta *Liquor Act,* 1916, ch. 4, the interpretation clause defining the meaning of the expression "liquor" or "liquors" was originally exactly the same as subsec. (*e*) of sec. 2 of *The Manitoba Temperance Act.* It was held by the Appellate Division of the Supreme Court, Harvey, C.J., dissenting, that the word "liquor" where used in the Act as it stood originally, meant a liquid commonly known as or adapted for reasonable use as a beverage for human consumption. See

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Rex v. Maclean, 13 Alta. L.R. 244, [1918] 2 W.W.R. 154, 29 C.C.C. 270.

In *Gleeson v. Hobson* [1907] V.L.R. 148, where the statute defined liquor as "any wine, spirits, ale, beer, porter, cider perry, or other spirituous or fermented liquor of an intoxicating nature," it was held that liquor meant a liquid commonly known and adapted as a drink or beverage for human consumption.

If this Court were to decide that "liquor" as defined in the Act includes all liquids capable of being drunk which contain over two and one-half per cent of alcohol, it would make illegal the sale not only of patent medicines, but of well-known specifics, liniments, tinctures, essences, extracts, perfumes, condiments, &c. If that interpretation were applied no licensed druggist could sell, except under a doctor's certificate, any patent medicine containing more than two and one-half per cent of alcohol, which would comprise virtually all patent medicines. No licensed retail druggist could sell to his ordinary customers any perfume in liquid form or any flavouring extract without danger of incurring the heavy penalties imposed by the Act.

In other provinces power has been given to pass orders in council regulating and permitting the sale of liquids containing alcohol. I have not been able to find any such power in *The Manitoba Temperance Act.* In Saskatchewan flavouring extracts were thoughtfully excepted from the operation of the Act [1917, ch. 23] (sec. 77). In that province a licensed retail druggist or, perhaps even a grocer, may sell a phial of vanilla or peppermint without rendering himself liable to a fine of $200 or imprisonment in default of immediate payment.

In the *Encyc. Brittanica,* 11th ed., under the heading "Alcohol," I find the following passages:

> The great importance of alcohol in the arts has necessitated the introduction of a duty-free product which is suited for most industrial purposes, and at the same time is perfectly unfit for beverages or internal application. * * *

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Judgment.

PERDUE, C.J.M.

For retail purposes the ordinary methylated spirit is mixed with .357% of mineral naphtha, which has the effect of rendering it quite *undrinkable.*

I cannot believe that the Legislature intended to propound the paradox that a liquid which has been made *quite undrinkable* becomes a drinkable liquid for the purposes of temperance legislation.

I think the prosecution has failed to prove that the patent medicine in question was a "liquor" within the meaning of *The Manitoba Temperance Act.* I think the conviction should be quashed and that the fine and costs, if already paid, should be returned to the accused.

CAMERON, J.A.—In this case there are set out in the judgment of Mr. Justice Dennistoun the material facts, subsec. (*e*) of sec. 2 of *The Manitoba Temperance Act,* 6 Geo V., ch. 112, on the construction of which the validity of the conviction depends and the reasons for judgment of the magistrate. The question to be decided comes to a narrow point. Did the Legislature by subsec. (*g*) above referred to, intend to use words applicable to those liquids only that can reasonably be considered beverages, or capable of being used as such, or did it intend to give the words a wider meaning that would include all liquids containing more than the prescribed percentage of alcohol that are capable of being swallowed? This last interpretation would extend the restrictive provisions of the Act to a great number and variety of patent medicines and of perfumes, lotions, paints, varnishes and other compounds into which alcohol enters as a solvent or preservative.

The Manitoba Temperance Act repealed *The Liquor License Act,* R.S.M., 1913, ch. 117 and it is useful to scrutinize the provisions of the latter Act which was in force for many years in this province. We are entitled to examine the previously existing law in seeking to ascertain the meaning of an enactment apparently obscure or uncertain.

We find the definition of the word "liquor" in subsec. (*g*) of sec. 2 of ch. 117, identical with that in the Act before us save that it does not contain the percentage provision. We have provisions for the issue of licenses for the sale of liquor and prohibitions of its sale by others than those licensed. In

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sec. 156 we have provisions as to chemists and druggists keeping and selling liquors on the conditions set forth, one of which, in the case of a retail druggist, was that he should sell only on a registered medical practitioner's prescription. There are also to be found elaborate provisions for the adoption of a local option by-law by any municipality, the effect of which was to introduce a system of prohibitions upon the sale of liquor and on its possession, similar to those found in the present Act. There provisions are to be found in sec. 265 of the Act, and refer to wholesale and retail druggists; the licenses required of them; their obligations in reference to the sale of liquor in detail; the privileges of veterinary surgeons and dentists; the sale of alcohol for mechanical and scientific purposes and other matters. Many of those provisions applicable to local option districts reappear in the present Act.

Now, it is the fact that during all the time *The Liquor License Act* was in force, the idea was never seriously entertained that its provisions applied to patent medicines, or to perfumes or paints or the other similar liquids mentioned and there was no attempt made to extend the interpretation of the word "liquor" in that Act to include those liquids or mixtures. Unquestionably it was understood that *The Liquor License Act* applied only to transactions in liquids capable of being used as beverages, an understanding quite justified by the wording of the Act. And I fail to see in the present Act any intention disclosed on the part of the Legislature to depart from or modify the previous Act, as it was administered and understood throughout the province for many years, in respect of the meaning to be attached to the word "liquor."

I would look upon the percentage proviso in subsec. (*g*), sec. 2, of *The Manitoba Temperance Act* as merely relating to evidence and not as altering the meaning of the preceding words "drinks and drinkable liquids." If the widest possible interpretation be given those words, we would be forced to the singular conclusion that a can of varnish, or a bottle of perfume could only be bought from a licensed druggist on a medical practitioner's prescription. That was certainly not the case under the old *Liquor License Act*, and I cannot believe that such a result was intended by the present legislation.

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I have read with attention the judgments of the members of the Supreme Court of Alberta in *Rex v. Maclean,* 13 Alta. L.R. 244, [1918] 2 W.W.R. 154, 29 C.C.C. 270, on the effect of a statutory provision practically identical with that before us, and I agree with the conclusions arrived at by the majority of the Court. I refer to the judgment of Beck, J. where he says at p. 163 ([1918] 2 W.W.R.), referring to the provisions of the Dominion *Proprietary or Patent Medicine Act,* ch. 56 of 1908 (Dom.) and of the provincial *Liquor Act,* 1916, ch. 4.

> I think there is no conflict [between these two Acts] because I think that the clear intention of *The Liquor Act* in its interpretation of "liquor," is to give to that word the meaning of liquor which, to substitute the words of the Dominion Act, can be used as an alcoholic beverage; and that in neither Act is absolute possibility or impossibility of such use intended, but that, in both cases, the kind of liquor, the sale of which is prohibited, is liquid which is commonly known or adapted for reasonable use as a drink or beverage for human consumption or which is reasonably capable of being used as a substitute for such a beverage or of being converted into such a beverage. See the Victoria decision of Cussen, J. in *Gleeson v. Hobson* [1907] V.L.R. 148, discussing the meaning of the word liquor under a similar Act.
>
> In any case under either Act the question whether the liquid in question comes within the prohibition is a question of fact.

Mr. Justice Beck's conclusion was that the Crown had not established that the mixture or liquid in question before the Court, was a liquor within the meaning of *The Liquor Act.*

I think it was not only not shown that the "Elixir" in question is a liquor within the meaning of *The Manitoba Temperance Act,* but the contrary was established, as the finding of the magistrate shows. The question is one of fact in each case to be decided on the evidence.

I would set aside the conviction.

HAGGART, J.A.—The patent medicine known as "Triner's American Elixir of Bitter Wine" in my opinion is not "drinkable," nor is it an alcoholic beverage within the meaning of those terms used in *The Manitoba Temperance Act,* 6 Geo. V., ch. 112.

I do not think the evidence warranted the magistrate's finding that the liquid was drinkable. His conclusion that the pre-

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paration contained sufficient medication to prevent its use as an alcoholic beverage and no more aclohol than was necessary to keep its component parts in solution would have justified him in dismissing the summons.

The order absolute should go for the *habeas corpus*, and the conviction should be quashed.

I have read the reasons of the Chief Justice and I agree with them.

FULLERTON, J.A.—Application to quash a conviction made by R. M. Noble, police magistrate, dated February 18, 1919. The offence charged was that Dojacek "did unlawfully keep liquor in a place other than in a private dwelling-house in which he resides."

The evidence shows that the accused is the manager of the Ruthenian Booksellers & Publishers Limited, an incorporated company. The company is the distributing agent for Western Canada of a preparation known as Triner's American Elixir of Bitter Wine, and it is in respect of this wine that the charge was laid.

The magistrate gave reasons in writing for his conclusions which are as follows:

I find that Triner's American Elixir of Bitter Wine kept by the accused in a place other than the private dwelling-house in which he resides, is a liquor as defined in *The Manitoba Temperance Act*, as it contains *over* 2½% proof spirits, also that it is a drinkable liquid which is intoxicating, but it contains sufficient medication to prevent its use as an alcoholic beverage, and no more alcohol than is necessary to keep its component parts in solution; that the preparation was on the market and handled by the accused as a patent medicine before the passing of *The Manitoba Temperance Act*.

The wine in question contains between 16 and 17 per cent of alcohol in volume, and is registered under *The Proprietary or Patent Medicine Act* of Canada, 1908, ch. 56.

Charles Norton, consulting chemist for Joseph Triner Company, Chicago, who are the manufacturers of the wine, was called as a witness for the defence.

He stated that each fluid ounce of it contained:

Cascara Sagrada	18 Gr.
Dandelion	10 "

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Licorice	2	Gr.
Gentian	2	"
Cloves	½	"
Sweet Orange Peel	½	"
Calamus	¼	"
Cinnamon	¼	"
Magnesia	¾	"

The validity of the conviction depends upon the interpretation to be placed on sec. 2 (*e*) of *The Manitoba Temperance Act* which reads as follows:

> The expression "liquor" or liquors" shall include all fermented, spirituous and malt liquors, and all combinations of liquors, and all drinks and drinkable liquids which are intoxicating; and any liquid which contains more than two and a half per cent. (2½ per cent.) of proof spirits shall be conclusively deemed to be intoxicating.

The contention of the Crown is that any liquid, however unpalatable or even poisonous, so long as it contains two and one-half per cent of proof spirits, comes within the statutory definition of "liquor."

On the other hand, counsel for the accused contends that the word "drinkable" means "suitable for being drunk" or "fit for drinking."

In order to arrive at the meaning of the words we are entitled to look at previous legislation on the subject as well as at all the other provisions of the Act.

The Liquor License Act, ch. 117, R.S.M., 1913, which was formerly in force in Manitoba defines "liquor" thus:

> The expression "liquor" or "liquors" means and comprehends all spirituous and malt liquors and all combinations of liquors and drinks and drinkable liquids which are intoxicating.

If the construction contended for by the Crown is correct, the result is that hundreds of liquids containing over two and a half per cent alcohol, which are commonly used in every household are being daily illegally purchased and used by the general public.

While the definition of "liquor" is practically the same in both Acts no one ever dreamed that under the old Act a license was required for the sale of such an article as forms the subject of the conviction here.

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The preamble to *The Manitoba Temperance Act* recites: "Whereas it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor."

What the liquor traffic was in Manitoba before *The Manitoba Temperance Act* came into force is well known, and it certainly did not include the sale of patent medicines, for example, many of which contain large percentages of alcohol.

Sec. 37 of *The Manitoba Temperance Act* which makes provision for alcohol being obtained from wholesale druggists for mechanical and scientific purposes requires the applicant to make an affidavit stating among other things: "that *such liquor is not intended to be used as a beverage or mixed with any other liquor for use as a beverage.*"

Sec. 49 provides that persons who are permitted to have liquor in their possession for certain purposes "shall not use or consume or allow to be used or consumed any of the said liquor *as a beverage.*"

Sec. 57 authorizes a physician to prescribe liquor or administer it himself; sec. 62 (1) contains the following provision:

* * * every person who directly or indirectly keeps or maintains or by himself or by associating or combining with any other or others, or in any manner aids, assists or abets in keeping or maintaining, any clubhouse, club or association room or hall or other place in which any liquor is received or kept for the purpose of use, gift, barter or sale as a beverage * * * shall be held to have violated section 48 of this Act. * * *

If the Act were given the interpretation contended for by the Crown it would have the effect of absolutely prohibiting the sale of many articles in common use. For example, take perfume, which contains a very large percentage of alcohol. I suppose it can hardly be contended that perfume is required for mechanical or scientific purposes within the meaning of sec. 37 of the Act. How then can it be legally procured? A retail druggist holding a license can only sell liquor for medicinal purposes, and then under a *bona-fide* prescription from a physician who can only give a prescription in case he deems intoxicating liquor necessary for the health of his patient. The sale of perfume is therefore prohibited, and also the sale of many other articles containing alcohol which is frequently

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used either as a preservative or to keep the ingredients in solution.

I cannot think that the Legislature ever intended to make the Act applicable to such preparations.

Reading the whole Act together, I think what was intended was to prevent the use of intoxicating liquors as a beverage.

In the case of *Rex v. Maclean,* 13 Alta. L.R. 244, [1918] 2 W.W.R. 154, 29 C.C.C. 270, the Supreme Court of Alberta had to construe a provision in *The Liquor Act* of Alberta, 1916, ch. 4, in the exact words of sec. 2 (*e*) of our Act.

The Court there held that the word "liquor" means a liquid which is commonly known or adapted for reasonable use as a drink or beverage for human consumption.

I would quash the conviction.

DENNISTOUN, J.A. (dissenting)—This is an application for *certiorari* in respect to a conviction under *The Manitoba Temperance Act,* 6 Geo. V., ch. 112. It is agreed by counsel that the Court may dispose of the matter finally if of opinion that an order *nisi* should issue.

The information is laid under sec . 49 of 6 Geo. V., ch. 112, for unlawfully keeping liquor in a place other than a private house. The accused is the manager of the Ruthenian Booksellers & Publishers Ltd., which is a limited company and acts as distributing agent of Triner's American Elixir of Bitter Wine, which he obtained in 50 or 100 case lots and sold to small shopkeepers. He acted in this capacity before *The Manitoba Temperance Act* came into force and has continued to do so. He is not a druggist and is not qualified to obtain a license under the Act either for wholesale or retail business. The magistrate's findings of fact are as follows:

I find that Triner's Elixir of Bitter Wine kept by the accused in a place other than the private dwelling-house in which he resides, is a liquor as defined by *The Manitoba Temperance Act,* as it contains over 2½% proof spirits, also that it is a drinkable liquid which is intoxicating, but it contains sufficient medication to prevent its use as an alcoholic beverage, and no more alcohol than is necessary to keep its component parts in solution; that the preparation was on the market and handled by the accused as a patent medicine before the passing of *The Manitoba Temperance Act,* and

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my interpretation of that Act is that such liquids must be sold only in accordance with the terms of the said Act.

The statute defines "liquor" in the following terms: [See *ante*, p. 2].

As Triner's American Elixir of Bitter Wine admittedly contains much more than two and one-half per cent proof spirits, the learned magistrate was unquestionably right in finding that it is intoxicating and it only remains to determine whether he was right in adjudging that it possesses the other statutory qualification of "liquor" and is a "drinkable liquid." Upon the meaning of those two words the case, in my opinion, turns.

The magistrate finds

that it is a drinkable liquid which is intoxicating, but it contains sufficient medication to prevent its use as an alcoholic beverage, and no more than is necessary to keep its component parts in solution.

When the case was before the magistrate, the Dominion *Proprietary or Patent Medicine Act*, 7 & 8 Edw. VII., ch. 56, was considered by him, and the references in his judgment just quoted were no doubt prompted by the provisions of that act.

I am of the opinion that the Dominion Act has no bearing on the present case and does not enter the same field of legislation. It is a statute to regulate the sale of patent medicine, and it makes it an offence to sell an alcoholic beverage as a medicine. It does not license or sanction the sale of alcoholic patent medicines even when medicated; all that can be said is that it does not then prohibit the sale: *Rex v. Axler*, 40 O.L.R. 304; *Rex v. Warne Drug Co., Ltd.*, 40 O.L.R. 469 at p. 470, 29 C.C.C. 384.

The magistrate's finding that Triner's American Elixir of Bitter Wine contains sufficient medication to prevent its use as a beverage is therefore of no importance, as the Manitoba Act does not primarily concern itself with beverages, though they are referred to in certain sections of the Act, but only with drinkable liquids.

These words were discussed in *Rex v. Maclean*, 13 Alta. L.R. 244, [1918] 2 W.W.R. 154, 29 C.C.C. 270, a case under

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The Liquor Act of Alberta (1916, ch. 4) which defined liquor in terms identical with those used by the Legislature of Manitoba. It is interesting to note in passing that the Alberta Legislature has since amended the definition by striking out the words "all drinks and drinkable liquids" thus simplifying the meaning of the statute and removing the uncertainty which remains in the Manitoba Act.

Harvey, C.J. at p. 156 ([1918] 2 W.W.R.) was of opinion that the word "drinkable" was unnecessary. He says:

> Leaving aside the first portion of the definition we find that "all combinations of liquors, and all drinks and drinkable liquids which are intoxicating" are liquors within the meaning of the Act. It is argued that the word "drinkable" limits the meaning of the word "liquid" because the word "liquid" itself means something which is not eatable and therefore can only be consumed by drinking and the word is therefore valueless if it simply means "capable of being drunk" and it must therefore mean "suitable for being drunk," or "fit for drinking." But it will be observed that this does not carry us very far for the adjective is not applied to any of the other described liquors and by the terms of the definition any "combination of liquors" or any drink which is intoxicating however nauseous, is liquor within the meaning, unless the terms are qualified in the same way, and I can see no justification whatever for any such qualification. It appears to me that the word "drinkable" must be given its common meaning though its use in this connection thus appears unnecessary.

In the present case the magistrate has found as a fact that Triner's American Elixir of Bitter Wine is a "drinkable liquid," using the words in their ordinary sense, "capable of being drunk".

I agree with this finding as there is sufficient evidence to support it.

It is not necessary to find that it can be consumed in anything but small quantities. Alcohol is found in certain well-known beverages in such strength that only very small quantities can be taken at a time; they are nevertheless "drinks and drinkable." In my judgment it was the consumption of alcohol by the people except under medical supervision which the Legislature set out to abolish, and not merely the suppression of well-known alcoholic beverages under familiar names, leaving medicated concoctions of equal or greater alcoholic strength to take their place.

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Counsel for the Crown agrees that if the law is as laid down by the magistrate in this case, and I think it is, no druggist who is not licensed under the Act can deal in patent medicines, scent, extracts, tinctures, etc. which are drinkable and contain more than two and one-half per cent proof spirits, and no store keeper can sell them under any circumstancees unless he is qualified, and obtains a druggist's license, and then only under a doctor's prescription.

The provinces of Ontario, Saskatchewan and Alberta have amended their *Temperance Acts* so as to make provision for such a state of affairs. The province of Manitoba has not yet done so, and one must take the plain ordinary meaning of the words used in the statute as alone indicating the intention of the Legislature. (*Vacher & Sons, Ltd. v. London Society of Compositors* [1913] A.C. 107, at p. 113, 82 L.J.K.B. 232.)

Evidence was given at the trial with regard to the quantity of this preparation which would be necessary to produce intoxication, with a view to showing that before a stage of intoxication could be reached nausea and sickness would intervene. The statute does not concern itself with intoxication, nor with the varying effect which alcoholic mixtures may have upon individuals.

It prohibits the sale of drinkable liquids which contain more than two and one-half per cent of proof spirits. It matters not how small the quantity which is or can be taken, or whether any be consumed at all.

The motion should be dismissed and the conviction affirmed.

Conviction quashed.

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COURT OF APPEAL 1919

REX V. NYCZYK

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

Criminal Law—Preferring Indictment—Acting Attorney-General Not a Lawyer—Omnia Praesumuntur Rite Esse Acta—Irregularity in Proceedings before Magistrate at Preliminary Hearing—Reading over Depositions Taken in Shorthand—Criminal Code, SS. 682-684, 872, 873.

Any of the other Members of the Executive Council of the Province of Manitoba, though not a barrister or solicitor, may, under sec. 12 of *The Legislative Assembly Act,* R.S.M., 1913, ch. 112, be appointed as acting Attorney-General of the province, temporarily or otherwise, and may prefer an indictment under sec. 873 of *The Criminal Code.*

The maxim, *omnia praesumuntur rite esse acta,* has special application in considering acts done by ministers of the Crown (per Perdue, C.J.M.).

When an indictment has been presented and a true bill found by the grand jury, the trial of the accused upon it can then proceed notwithstanding any irregularities in the proceedings leading up to his committal by the magistrate for trial.

Rex v. Morin (1917) 28 C.C.C. 269, followed.

The Crown prosecutor may, under sec. 872 of *The Code* prefer an indictment before any Court of criminal jurisdiction, without the *fiat* being signed by the Attorney-General or a judge.

Per CAMERON, J.A.: When the depositions at a preliminary hearing are taken down in shorthand it is not necessary, under secs. 682-684 of *The Code,* to ask the accused whether he wishes them read again or to read them again to him.

ARGUED: 14th May, 1919.
DECIDED: 23rd May, 1919.

Statement.

The accused being convicted for theft before Prendergast, J. and a jury, a reserved case was stated to this Court to quash the conviction upon the ground that the acting Attorney-General who preferred the indictment was not a barrister or solicitor and irregularities leading to the committal of accused set out fully in the judgment of Comeron, J.A. The conviction was sustained.

H. F. Maulson, K.C., for the accused.

Geo. A. Eakins, for the Crown.

PERDUE, C.J.M.—This is a reserved case stated by Prendergast, J. before whom the accused was tried at the spring assizes for the Northern Judicial District. The facts of the case and the questions of law to be considered appear in the reserved

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case which is fully set out in the judgment of my brother Cameron.

As to question No. 1: By sec. 872 of *The Criminal Code* counsel acting on behalf of the Crown at any Court of criminal jurisdiction may prefer against any person who has been committed for trial at such Court a bill of indictment for the charge on which the accused has been so committed or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice. It is admitted that the indictment in this case was preferred before the grand jury by the Crown prosecutor, Mr. Eakins. That in itself appears to me to cover the objections in the present case. However, the question is asked as to the authority of an "Acting Attorney-General" to prefer an indictment. Sec. 873 of *The Code* provides that the Attorney-General or anyone by his direction may prefer a bill of indictment. By subsec. (2), sec. 2, of *The Code* "Attorney-General" means the Attorney-General or Solicitor-General of the province in which proceedings are taken under *The Code*. That would mean the Attorney-General appointed and holding office under the constitution and laws of the province. Turning to *The Legislative Assembly Act* of Manitoba, R.S.M. 1913, ch. 112, sec. 12, we find that

> Any of the powers and duties which have been heretofore or shall be hereafter assigned by law to any of the officers now constituting, or who may hereafter constitute, the Executive Council, or which by the operation of any statute or by law devolve upon any such officer, and that whether such office be then filled or not, may from time to time, by order-in council, be assigned and transferred, either for a limited period or otherwise, to any other of the said officers by name or otherwise, and the officer to whom such powers and duties may be assigned shall, for the execution of such powers and duties, have the right to use the name and exercise the functions of such office, the duties of which are so assigned to him.

The Attorney-General's Act, R.S.M., 1913, ch. 14, sec. 2, creates the Department of the Attorney-General, "over which the Attorney-General of Manitoba for the time being * * shall preside," and sets forth his duties and powers. Any of these duties and powers may, under ch. 112, sec. 12, above cited, be assigned from time to time to any other member of the Executive Council. The power of preferring indictments, being one of the powers of the Attorney-General of this province, might therefore be transferred, as it was in the present

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case, to the Hon. T. C. Norris, another member of the Executive Council. There is nothing in the statutes that I can find requiring the Attorney-General to be a barrister or a solicitor, although the holder of that office usually is a barrister. The word "Acting" placed before the expression "Attorney-General" does not, in my view, weaken or affect the latter. It is simply a notification that the department is being administered for the time being by another member of the Executive Council, under the authority of ch. 112, sec.12.

The maxim *omnia praesumuntur rite esse acta* has special application in considering acts done by ministers of the Crown. "It is a general presumption of law that a person acting in a public capacity is duly authorized so to do:" per Lord Ellenborough in *Rex v. Verelst,* 3 Camp. 432 at p. 433 (14 R.R. 775). In *Rex v. Jones,* 2 Camp. 131 (11 R.R. 680), the accused was indicted for frauds committed by him in his office of commissary-general. The Crown offered in evidence a letter addressed to him containing certain instructions he was accused of disregarding. This letter was signed by Mr. Pitt and two other Lords of the Treasury. Counsel for the accused contended that before the letter could be read it was necessary to prove that Mr. Pitt and the two others were Lords of the Treasury and that they had authority to sign it. Lord Ellenborough admitted the letter merely on proof of the handwriting of the three persons signing it. See also *Bremner v. Hull,* L.R. 1 C.P. 748, at p. 759, 35 L.J.C.P. 332; *Doe d. Hopley v. Young,* 8 Q.B. 63, 15 L.J.Q.B. 9; *McGahey v. Alston,* 2 M. & W. 206, at p. 211, 2 Gale 238, 6 L.J. Ex. 29; *Faulkner v. Johnson,* 11 M. & W. 581, 1 D. & L. 346, 12 L.J. Ex. 433; *Hastings Peerage Case,* 8 Cl. & F. 144, 621.

The foregoing answers the first three questions.

Question No. 4 is immaterial in the present case.

In regard to question No. 5, I am at a loss to see how it can be raised in the present condition of the cause. There was a preliminary inquiry into the charge against the accused and, whether it was regularly conducted or not, he was committed for trial. If the proceedings upon an inquiry are so irregularly and defectively conducted that there is no justification

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for the committal of the person charged, it is possible that relief may be obtained under a *habeas corpus*. But when an indictment has been presented and a true bill found, the trial of the accused upon the indictment can then proceed, notwithstanding any irregularities in the proceedings before the magistrate, these last-mentioned proceedings forming no part of the trial on the indictment. This was fully considered and decided in *Rex v. Morin,* 28 C.C.C. 269, by the Court of King's Bench, province of Quebec, the full Court consisting of four Judges being unanimous. It is true that Sir Francois Lemieux, C.J., sitting as a single Judge, took a different view in *Rex v. Beaulieu,* 28 C.C.C. 336, but as this case was decided before the decision in *Rex v. Morin, supra,* it must be taken to have been over-ruled by the latter.

The accused in the present case pleaded guilty to the first two counts and has received sentence upon them. The offences charged in these two counts are of themselves amply sufficient to justify the sentence.

I would answer the questions as follows:

No. 1.—He has.

No. 2.—He could and can.

No. 3.—He was.

No. 4.—In view of the foregoing it is not necessary to answer this question.

No. 5.—The accused was committed for trial, an indictment was presented and a true bill was found by the grand jury. It is not therefore necessary to consider alleged defects in the taking of the depositions on the preliminary inquiry.

No. 6.—It should not.

CAMERON, J.A.—At the spring assizes for the Northern Judicial District before the Honourable Mr. Justice Prendergast he submitted certain questions for the determination of this Court. His Lordship's statement is as follows:

At the Spring Assizes of the Northern Judicial District, beginning on the 11th day of March, 1919, the Grand Jury presented an indictment against the accused containing four counts as follows:

1. Theft of one buckskin horse.

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2. Theft of one bay mare, 1 set harness, one cutter and two horse blankets.

3. Theft of one watch.

4. Theft of one pocketbook containing $5.50.

Mr. George A. Eakins, Crown Prosecutor of the Northern Judicial District appeared for the Crown.

Mr. H. F. Maulson, K.C., for the accused.

Upon the accused being arraigned his Counsel moved to quash the indictment upon the following grounds:

(a) Because an acting Attorney General has no authority to prefer an indictment.

(b) Because even if an acting Attorney General has such authority, the Honourable T. C. Norris not being a lawyer could not be an acting Attorney General.

(c) Because even if an acting Attorney General has authority to prefer an indictment and if the Honourable T. C. Norris may act as acting Attorney General, he was not the acting Attorney General but the Honourable G. A. Grierson was the acting Attorney General.

2. That the Crown Attorney could not be said to have presented the indictment as he only has authority to do so when there has been a properly conducted preliminary enquiry, and that in this case there was not a properly conducted preliminary enquiry inasmuch as the Police Magistrate did not, after all the evidence which was taken in shorthand by the duly sworn Official Court Stenographer of the Northern Judicial District, for the prosecution was in, cause the evidence to be read to the accused, and did not ask the accused if he dispensed with the reading thereof.

Certified copy of Order-in-Council No. 30122 was filed and the following facts were agreed to by Counsel.

1. That the indictment is signed by the Honourable T. C. Norris.

2. That the indictment so signed was preferred before the Grand Jury by Mr. Eakins, the Crown Prosecutor of the Northern Judicial District.

3. That the Honourable T. C. Norris is not a lawyer.

4. That the depositions at the preliminary enquiry were taken in shorthand by the duly sworn Official Court Stenographer of the Northern Judicial District, and that at the close of the case for the prosecution the depositions were not read to the accused, nor was he asked if he dispensed with the reading thereof.

5. That the Honourable George A. Grierson was in the City of Winnipeg at the time the indictment was signed by the Honourable T. C. Norris.

I dismiss the motion to quash.

Counsel for the accused thereupon asked me to reserve a case for your Lordships upon the points above raised, which I agreed to do. Subject to this the accused pleaded "guilty" to counts one and two and "not guilty" to counts three and four.

He was then tried upon counts three and four and found guilty on both and I sentenced him on all four counts to fifteen months' hard labour.

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There was evidence upon which the jury could properly find him guilty upon counts three and four.

No application for suspension of sentence or bail was made and the accused is now serving under his sentence in the common jail at Portage la Prairie.

The questions, therefore, to be submitted for your Lordships' determination are as follows:

1. Whether an acting Attorney General has authority to prefer an indictment.

2. Whether, if an acting Attorney General has such authority, the Honourable T. C. Norris who is not a lawyer could act as acting Attorney General and as such prefer an indictment.

3. Whether the Honourable T. C. Norris was in fact an acting Attorney General at the time he signed the indictment in question herein.

4. Whether the Crown Prosecutor has himself power to prefer an indictment if there has not been a properly conducted preliminary enquiry.

5. Whether, when the depositions at the preliminary enquiry have been taken in shorthand by the duly sworn Official Court Stenographer of the Northern Judicial District, it is necessary after all the evidence for the prosecution is in to read the depositions to the accused, unless the accused dispenses therewith, and if so, is the omission such that the Crown Prosecutor cannot himself prefer an indictment before the Grand Jury.

6. Whether the conviction herein should be quashed.

Before hearing the argument it seemed to me surprising that there should be any doubt as to the authority of an acting Attorney-General to prefer an indictment, and after considering the argument of prisoner's counsel I must say that nothing was urged before us to lead me to alter this opinion. That the Honourable T. C. Norris was not a lawyer is immaterial and I have no doubt he was "acting" when he signed the indictment. In view of the foregoing there seems to be no present necessity to answer question No. 4, which is rather broadly stated. As the facts appear in this case my own conclusion would be there is really no question as to the power of the crown prosecutor to prefer an indictment under sec. 872, but as I have said, there is no object in dealing with this point.

As to question No. 5, the answer to this depends on the construction of secs. 682, 683 and 684 of *The Criminal Code*. My own idea of the proper construction of these sections is that they intend to provide for two methods of taking down the evidence of witnesses, (1) In writing, when it is to be read over to the witnesses and signed by them and the justice; or

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(2) In shorthand, by a stenographer who shall take an oath faithfully to report the evidence, which is not read over to or signed by the witnesses, but is authenticated by the reporter. In the case of (1) it is provided that the justice shall, unless he discharges the prisoner, ask the accused whether he wishes the depositions read again, and, unless the accused dispenses therewith, he shall read them again. But this is not so in the case of (2) where the depositions are in shorthand for reasons that are obvious. This seems clear from the wording of sec. 684, which says, "after the depositions have been signed as aforesaid" the justice shall ask the accused if he wishes "the depositions read again" and shall, unless the accused waives the reading, "read or cause them to be read again"; and subsec. 2 says, "when the depositions have been again read." These provisions have apparently no application to cases where the depositions are not signed by and have not been read to the witnesses.

Counsel for the prisoner relied upon the decision of Sir Francis Lemieux, Chief Justice of the Superior Court of Quebec, in *Rex v. Beaulieu,* 28 C.C.C. 336, January 27, 1917, where an indictment founded on a committal for trial was quashed on a similar objection and the direction of *The Code,* sec. 684, was held imperative and not permissive. But in the same volume at p. 269, *Rex v. Morin* was decided, May 9, 1917, by the full Court of King's Bench of Quebec, and it was held that it was error to say that the arrest and the preliminary hearing form part of a trial before the Criminal Court, and that, notwithstanding there may be irregularities and omissions at the preliminary hearing, the moment that there is a commitment an indictment may be based thereon and presented to the grand jury.

The grand jurors hear the witnesses upon this indictment and decide whether or not the accused should be put on trial; they can do this even if the proceedings before the magistrate at the preliminary hearing have not been regular.

This statement of the law seems to me beyond controversy, and we need not consider the alleged irregularity of the proceedings before the magistrate. I refer also to *Rex v. Seguin,* 20 C.C.C. 69.

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I would answer the reserved questions in accordance with the foregoing, and as set out in the judgment of the Chief Justice.

HAGGART and FULLERTON, JJ.A. concur.

COURT OF APPEAL

LOCKSHIN v. C.N.R.

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

Railway—Common Carrier—When Transit of Goods Is at an End—Liability of Carrier for Damage Occurring after Notice of Arrival of Car—Telephone Communication—Evidence.

Plaintiff, having been advised on a Saturday morning in very cold weather that a car of potatoes consigned to him had arrived at the freight shed of the defendants in Winnipeg, got his daughter to telephone to the freight department to ascertain if it was necessary to go at once and take delivery of the potatoes. Her evidence was that some person in that department, whose name or position she did not know, told her that delivery could not be got until Monday morning and that the potatoes would be all right until then.

Plaintiff then waited until Monday when he took the necessary steps to secure delivery but on inspection found the potatoes frozen. This, according to the evidence, must have happened after the arrival of the car in Winnipeg.

Held, that plaintiff had no right to rely on the telephone conversation but should have paid the freight on the Saturday and demanded prompt delivery of the car, and that he could not recover for the damage of the goods.

The liability of the railway company as a carrier, and therefor an insurer, ceases and becomes that of a mere warehouseman after the lapse of a reasonable time after receipt by the consignee of notice of the arrival of the goods. *Burdett v. C.P.R.* (1894) 10 Man. R. 5 and *G.T.R. Co. v. McMillan* (1889) 16 S.C.R. 543, followed.

What is a reasonable time must be determined with a due regard to surrounding circumstances, and in this case under the circumstances, the plaintiff delayed action beyond a reasonable time.

ARGUED: 23rd June, 1919.
DECIDED: 15th July, 1919.

Statement.

Appeal from a judgment of Myers, J.C.C. in the County Court of Winnipeg in favour of the plaintiff for $500 damages for the breach of a contract to carry a carload of potatoes and cabbages from Buchanan to Winnipeg. Appeal of defendants allowed.

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CAMERON, J.A.

O. H. Clark, K.C., for defendants, appellants.

R. A. Bruce, for plaintiff, respondent.

PERDUE, C.J.M. concurred.

CAMERON, J.A.—This action is brought to recover damages in respect of a carload of potatoes and cabbages shipped by the plaintiff, on December 6, 1917, from Buchanan, Saskatchewan, to the plaintiff, Bookhalter, a partner of the plaintiff. It is alleged that the vegetables were received by the defendant company in good condition, but it neglected to keep the car properly heated, in consequence of which the contents were frozen. His Honour Judge Myers, before whom the case was tried entered judgment for the plaintiff for the amount claimed.

The evidence appears to be that the car was heated and the lamps burning until its arrival in Winnipeg at five o'clock Saturday morning. It was accompanied by a man named Rillick who travelled on a pass given to the plaintiff for the occasion, and from time to time inspected the car. He says the heaters were going all right on his last inspection. On his arrival in Winnipeg he at once notified Lockshin saying the car was in good condition (p. 20). It is a reasonable inference that the damage was done after the car reached Winnipeg. Early on Saturday the plaintiff's daughter called up the defendant's freight department, and her evidence of what occurred is as follows:

Q. Do you remember when that car arrived in Winnipeg? A. Yes, on a Saturday morning, and after we had been notified that the car was in I was asked to 'phone to the C.N.R. and ask whether we should come down and pay the freight and see the potatoes. I did that and they told me we could not do that until Monday morning and that the potatoes were all right until then.

Q. Did you know who you spoke to on the 'phone? A. I spoke to the freight department and that is all I know.

Q. Did the party who spoke to you seem to know about the car? A. Yes, well I have called up once and he said he would trace it up and for me to call up again. I called up again and he said he already knew about it and nothing could be done until Monday morning.

Q. He told you they would be all right until then? A. Yes, I asked him particularly whether the potatoes would be all right until Monday and he said they would be all right.

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Q. Why did you ask him that? A. I was asked to ask that because when the potatoes arrived here we understood we were to be very prompt to pay the freight and accept the car and we did that. We knew we had to do it and we 'phoned up, and knowing that it was our responsibility to be there I asked him whether the potatoes would be all right and he said they would be.

Q. On account of the cold weather? A. Yes, it was cold out and we wanted to know if the potatoes would be protected until then.

Lockshin then went to the freight department on Monday morning and paid the freight, surrendered his bill of lading and got a receipt in exchange. He gave instructions to have the car placed at the William Davies Company siding, and states he was told they "would give him the car right away." It was delivered there on Tuesday forenoon, and the contents inspected at a quarter after one o'clock and rejected.

Ex. 1 is in form a live stock special contract given by the defendant's agent at Buchanan, to and signed by the defendants. It contains no special provisions applicable to the shipment in question and leaves the contract practically an open one, and the railway company remained under its common-law liability.

The weather was considerably below zero during the time of the shipment and at and after its arrival (Napier, p. 59). The car was put in a "warm shed" on Monday. These warm sheds do not appear to be heated. Lockshin remarks: "Outside is warmer than the warm sheds."

The questions at issue seem to me to come down to a narrow point. Lockshin knew the goods were perishable, that the next day was a Sunday, that the temperatures were low and that delays were dangerous. There was no reason why he should not have paid the freight on Saturday and have demanded prompt delivery of the car, except that his daughter, who fully realized the situation, says she was told by some one in the freight office over the telephone that nothing could be done before Monday morning, and when she asked if the potatoes would be all right, some unknown person assured her they would be.

The consignee must have a reasonable time to remove his goods. "What that time is must depend on the circumstances

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of each case." 4 *Halsbury* 12. See also *Macnamara's Law of Carriers by Land,* p. 82. We have in this case to take into particular consideration the perishable nature of the goods, and the extremely cold weather, and the fact that the next day was Sunday, of all of which the plaintiff was, of course, aware. He should have lost no time but should have paid the freight charges on Saturday and have given his directions for delivery on the same day. To delay was to invite the risk of loss. If he had acted promptly, the loss might well have been avoided. It is true that he gives as his reason for this what was said to his daughter over the telephone, but we cannot give evidential value to statements made over the telephone by an unidentified person. There was time to have put the transaction through on Saturday, and no adequate reason is given in evidence why it was not.

Corby v. G.T.R., 23 O.L.R. 318, 2 O.W.N. 793, 18 O.W.R. 766, is the converse of this case, the railway company there being held liable for want of diligence in giving notice of the arrival of a car of pineapples. The fruit arrived at its destination on Saturday, June 25, and notice was not given until the 27th, when it was found to be damaged by heating and the railway company was held liable.

There is a stage in such transactions where the company's liability as a carrier, and therefore, an insurer, ceases and becomes that of a mere warehouseman. This occurs when notice of arrival has been given (or dispensed with as in this case) and a reasonable time thereafter has elapsed. See the judgment of Dubuc, J., in *Burdett v. C.P.R.,* 10 Man. R. 5, citing *G.T.R. v. McMillan,* 16 S.C.R. 543, and other cases.

I am of the opinion that in this case a more than reasonable time was allowed by the plaintiff to elapse before they put themselves in a position to take delivery and the action must fail.

HAGGART, J.A. concurred.

FULLERTON, J.A.—This is an appeal from a judgment in favour of the plaintiff for the sum of $500 damages for the breach of a contract to carry a carload of potatoes and cabbages from Buchanan to Winnipeg. The contract is on the

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form known as the "Live Stock Special Contract," the agent having, through an error, used this form instead of the form of contract intended for ordinary shipments. The terms and conditions of this contract are for the most part inapplicable to the carriage of the goods in question. Eliminating what are inapplicable there remains simply an open contract of carriage, by which the defendant acknowledges receipt of 500 bushels of potatoes and cabbages consigned to S. Bookhalter, 644 Magnus Avenue, to be transported over the defendant railway and delivered at Winnipeg.

The car used was a refrigerator car heated with coal oil lamps.

It left Buchanan the night of Thursday, December 6, and arrived in Winnipeg at 7.30 on the morning of Saturday, December 8. One Rillick, an agent of the plaintiff, came to Winnipeg on the same train and immediately notified the consignee of the arrival of the car. The consignee took no immediate steps to take delivery. On Monday, the 10th, he paid the freight and requested the defendant to deliver the car at the siding of the William Davies Company, which was done on the following day. When the car was opened the potatoes and cabbages were found to be frozen. The lamps were burning when the car was sealed by the agent at Buchanan.

The defendant called witnesses to show that the lamps were burning all the time the car was in transit and also while in the Winnipeg yards.

The weather was very cold on December 9, 10 and 11. Boyd, a car-inspector in the employ of the defendant, says that it was 15 below zero at seven o'clock in the morning of December 8.

Napier, a heater inspector, was asked: "Do you know anything about the temperatures on the 9th, 10th and 11th? A. Yes. Eight o'clock in the morning was 20 below." I think he is referring to the morning of the 9th.

Napier says that on the 10th the temperature was 26 below zero at 7 o'clock; 12 below at 13 o'clock and 10 below at

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18 o'clock. On the 11th it was 4 below at 7 o'clock and 1 below at 13 o'clock.

James McKay, a witness called for the defendant, states that "when you get 10 below or thereabouts it is pretty hard to heat a car," and that "down to about 20 below or thereabout I don't think you could possibly heat it."

The learned County Court Judge who tried the case thinks the potatoes were frozen after their arrival in Winnipeg and the evidence supports his view.

It is important to determine when the *transitus* ended and the liability of the defendant as carriers ceased.

In *G.T.R. v. McMillan,* 16 S.C.R. 543, Mr. Justice Strong, at p. 555, said:

> It is well established by incontrovertible authority that the liability of carriers by railway *qua* carriers terminates upon the arrival of the goods carried at their destination and the expiration of a reasonable time afterwards for their delivery. *Chapman v. G.W. Ry. Co.,* 5 Q.B.D. 278, 49 L.J. Q.B. 420. What is a reasonable time must be determined with a due regard to surrounding circumstances.

Burdett v. C.P.R., 10 Man. R. 5, was an action to recover the value of goods destroyed by fire while on the siding of the defendant company at Emerson. The car arrived at noon and was burned during the following night. It was held that the *transitus* was at an end and the liability of the defendants as common carriers had ceased before the fire took place.

The temperature when the car arrived early Saturday morning was 15 below zero. The plaintiff knew the risk he was taking in neglecting to take delivery immediately. Fanny Lockshin, a daughter of the plaintiff, who was called by the plaintiff, says: "We understood we were to be very prompt to pay the freight and accept the car."

To account for the delay in taking delivery the plaintiff relies on a conversation which Fanny Lockshin swears she had over the telephone with someone in the freight department of the defendant company. She says she inquired about the car and was informed that "nothing could be done until Monday morning." She further says: "I asked him particularly whether the potatoes would be all right until Monday morning and he said they would be all right."

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FULLERTON, J.A.

While no objection was taken to the admission of this evidence the rule, as I understand it, is that the Court should reject evidence not properly receivable even if it has not been objected to.

In my opinion before the plaintiff can bind the defendant by a conversation of this character he must first show that it was had with some person in authority. Here the witness can only say: "I spoke to the Freight Department and that is all I know."

In arriving at a decision in this case I would therefore disregard this conversation entirely.

Under all the circumstances, I would hold that it was the duty of the plaintiff to take delivery on Saturday, December 8, and that the defendant's liability as carrier ceased on that day.

It is contended that even if the defendant is not liable as a carrier it became a bailee of the goods the moment the *transitus* was completed and the fact of leaving the car in the open in such cold weather was evidence of negligence. Defendant has proved that it kept the lamps burning in the car, and short of unloading and storing its contents, it is difficult to suggest what they should have done further to protect the goods. The plaintiff was clearly at fault in failing to remove the goods on the Saturday and it must be the plaintiff and not the defendant who should assume the risk of damage being caused by frost.

I would allow the appeal with costs and dismiss the action with costs.

Appeal allowed with costs.

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COURT OF APPEAL

REX V. STEIN

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

Manitoba Temperance Act, 6 Geo. V, Ch. 112, SS. 49, 91—"Having or Keeping" Liquor—Possession—Evidence — Rebuttal Evidence — Certiorari.

M., carrying a parcel containing liquor, employed S. to carry him and the parcel in S.'s waggon to another point in the city. The parcel was put under the seat by M. who rode in the waggon. Upon arriving near his destination M. stopped the waggon and got out to look for a house number while S. drove on a short distance and then waited for him, the parcel remaining under the seat without having been handled by S. Before M. got back to the waggon, liquor detectives came up and seized the parcel.

Held, CAMERON, J.A. dissenting, that S. could not be convicted of "having" the liquor contrary to sec. 49 of *The Manitoba Temperance Act,* 6 Geo. V, ch. 112, as he never had it in his actual possession or control. *Biggs v. Mitchell,* (1862) 2 B. & S. 523; *Reg. v. Rosenthal,* (1865) L.R. 1 Q.B. 93, and *Bigattini v. Dixon* [1919] 1 W.W.R. 464, followed.

Per PERDUE, C.J.M.: Counsel for the Crown prosecuting such a charge cannot split up his case by merely putting in evidence of possession to make a *prima facie* case under sec. 91 of the Act, and withholding evidence to show guilty knowledge so as to put it in in rebuttal after the accused has attempted to prove his innocence. Such evidence should therefore be disregarded on a motion for a *certiorari* to quash the conviction.

ARGUED: 20th June, 1919.

DECIDED: 15th July, 1919.

Statement.

On motion before this Court for *certiorari,* it was agreed that the whole matter should be argued. The accused, a pedler with a horse and wagon, who was employed by one Mock to carry a parcel containing liquor, was convicted in that he "unlawfully did have liquor, &c." The conviction was quashed.

S. Hart Green, for the accused.

W. Manahan, for the Crown.

PERDUE, C.J.M.—This is a motion for a *certiorari.* The accused was convicted by R. M. Noble, Esq., police magistrate for the city of Winnipeg, in that he "unlawfully did have liquor in a place other than in the private dwelling-house in which he resides." The facts are briefly as follows:

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PERDUE, C.J.M.

The accused is a junk peddler and has a horse and waggon which he uses in his business. On Saturday, May 24, one Mock, another junk dealer, who did own a conveyance, asked the accused to deliver a parcel for him agreeing to pay him $1 for so doing. Accordingly, the accused driving his waggon met Mock at the corner of Power and Pritchard Streets at seven o'clock in the morning of Monday, May 26. Mock had a parcel in a bag, or with a bag wrapped around it, and this he put into the waggon of the accused under the seat and covered it with some junk that was in the waggon. Mock got into the waggon and accompanied the accused. By the direction of Mock, Stein drove to St. Mary's Avenue. Mock stopped the waggon and got out to look for a house number while the accused drove on a short distance, stopped and waited for him. Two liquor detectives then came up, looked into the waggon and seized the parcel placed there by Mock. The parcel was a case of whisky. Mock admitted that he owned it, that he had intended to sell it, and that he was looking for the number of the house to which he was to take it, when the detectives came and seized the liquor. Mock was charged and convicted of unlawfully keeping liquor for sale. The magistrate imposed a fine of $300 and, in default of payment imprisonment for five months. This disposed of the matter so far as Mock was concerned.

The charge against Stein was then proceeded with. It was agreed that the evidence in the Mock case should, as far as it was applicable, be used as evidence in the Stein case. This evidence was put in by the prosecutor. The two detectives again gave evidence as to finding and seizing the liquor. The case for the prosecution was then closed. Stein's counsel moved for a dismissal of the case on the ground that there was no evidence to show that the accused knew of the liquor and further that it never was in his possession or under his control. The magistrate was at first of the opinion that no *prima-facie* case had been made out, but finally decided that a defence should be put in. The accused, who is a foreigner and speaks little or no English, gave his evidence through an interpreter. He told how Mock had hired him to deliver the parcel. He stated that he did not know what was in the parcel.

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On his cross-examination questions were put to him by the prosecuting counsel as to whether he had been at the house of McPhail, one of the detectives along with Mock, three or four weeks previously. His answers were to the effect that he did not know McPhail or his house. McPhail was called in rebuttal and was asked by the Crown prosecutor whether Stein had ever been at his place. This was objected to as irrelevant. After discussion, the magistrate allowed the question and permitted evidence to be given by McPhail that the accused and Mock had visited his house some three weeks previously, and that Mock, while Stein was present, had promised to get McPhail two bottles of whisky for $7 each. The magistrate found the accused guilty and imposed a fine of $200.

The magistrate in allowing the so-called rebuttal evidence expressed the following view:

It seems to me that the whole method of trial procedure is changed by sec. 91. Under that section the Crown puts in *prima-facie* evidence of possession of liquor by the accused and properly rests its case there. The onus of meeting the Crown's *prima-facie* case passes to the accused. The accused puts in his defence and the real trial then starts by the Crown putting in whatever evidence it has to meet the case established by the defence witnesses. The defendant must prove his innocence affirmatively and the Crown in rebuttal must meet the accused's defence.

I do not think that this is a proper view to take of sec. 91 [of *The Manitoba Temperance Act,* 1916, ch. 112]. That section enacts that if in the prosecution of a person charged with committing any of the offences referred to in the section *prima-facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged.

I think the rules applicable to prosecutions in general still apply and that the Crown cannot split up its case by merely putting in evidence of possession to make a *prima-facie* case and withholding evidence relating to the charge so as to put it in in rebuttal. The Crown had called McPhail as a witness to prove the case against Stein, and he had testified as to finding the liquor in Stein's waggon. McPhail should have then given all the evidence he could give to establish the charge. He was called in rebuttal in the first place to contradict answers given by the accused in cross-examination on immaterial matters.

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He was then allowed to give evidence which was not evidence in rebuttal but was intended to strengthen the main case.

This evidence related to a conversation with Mock carried on in English some time prior to the committing of the offence and having no reference to it. Nothing came of this conversation and although it took place in the presence of Stein, it is unlikely that he would understand it by reason of his ignorance of the English language. The evidence was given to prove guilty knowledge in Stein. It should have been put in, if at all, when the Crown was proving its case. Introducing it in rebuttal deprived the accused of an opportunity of contradicting it.

The evidence put in by the prosecution in the Mock case proved the case against him and disproved the case against Stein. The charge against Mock was that he "unlawfully did keep liquor for sale." The charge is laid under sec. 48 of *The Manitoba Temperance Act* and the expression "keep for sale" implies possession of the goods and power to dispose of them. The evidence showed that Mock owned the case of liquor and that when he placed it in Stein's waggon he got into the waggon and rode with Stein to the place on St. Mary's Avenue, where he got out to look for the number. Mock did not part with possession of the liquor during the few moments he was absent from the waggon. The evidence against Mock which was put in by the Crown to prove the charge laid against Stein established that the liquor was not, and never had been the property of Stein, and that the latter was not, and had not been, in possession of it.

The charge against Stein is laid under sec. 49 of the Act. The main paragraph of that section is as follows:

> No person within the Province of Manitoba by himself, his clerk, servant or agent shall have or keep or give liquor in any place wheresoever, other than in the private dwelling house in which he resides, without having first obtained a druggist's wholesale license or a druggist's retail license under this Act authorizing him so to do, and then only as authorized by such license.

The expression "have or keep" has several times received judicial interpretation. In *Biggs v. Mitchell,* 2 B. & S. 523, 31 L.J.M.C. 163, a licensed carrier had received for carriage

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packages of gunpowder amounting to 300 pounds and had placed them in a warehouse in London until he could send them to their several destinations. The statute 12 Geo. III., ch. 61, enacted that a person not a dealer should not "have or keep" at any one time more than 50 pounds of gunpowder in any house, warehouse, &c. within the cities of London or Westminster. It was held that in the proper interpretation of the statute "have" was synonymous with "keep," that the kind of keeping meant was in the sense of "storing" and that the temporary having or keeping by a carrier while the goods were in transit was not an offence under the Act.

In *Reg. v. Rosenthal,* L.R. 1 Q.B. 93, 7 B. & S. 124, the defendants had hired an unlicensed public room for six nights and performed stage plays in it. Sec. 2 of 6 & 7 Vict., ch. 68 [*An Act for regulating Theatres*] enacted that "it shall not be lawful for any Person *to have or keep* any House or other Place of public Resort, * * for the public Performance of Stage Plays," without authority by letters patent or license. It was held that the section had reference to the person who has permanent control of the room and not to one who took it temporarily.

In the present case, as I have above pointed out, Mock had not parted with the possession and control of the parcel in question. Stein was for a few minutes in *apparent* possession of the liquor, but the evidence put in by the prosecution proved that the actual possession was in Mock. I think that where the offence charged is that the accused "did have liquor in a place other than, etc." under sec. 49, and it is shown that at the time when the alleged offence took place the accused had not the actual possession or ownership of the liquor, the prosecution must fail as against him.

In my opinion the conviction against Stein should be quashed and the fine remitted.

CAMERON, J.A. (dissenting)—Under sec. 91 of *The Manitoba Temperance Act,* 1916, ch. 112, *prima-facie* evidence having been given the accused is "obliged to prove that he did not commit" the offence charged. In this case he failed to convince the magistrate of his innocence, that is to say, the mag-

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CAMERON, J.A.

istrate, as was his right, refused to accept the specific denials made by the accused. If he rejected the accused's story it was his duty to convict him.

As for the question of possession I have no difficulty whatever. The man Mock was the principal in the transaction, and the accused was his agent. When they were both in the vehicle in which the liquor was concealed, each was in possession of it, the accused having a certain authority subject to the control of his principal. The accused was the owner of the horse and vehicle and had control of them subject to Mock's directions until the liquor had been delivered. As a matter of fact at the time of the discovery of the liquor by the officer underneath the seat of the vehicle, Mock was some distance away. Clearly if the accused thought that the case of liquor was insufficiently concealed, and if he thought it could be better hidden, without his movements being observed, he would have done that very thing. And if he thought he could have avoided detection by driving away, he would have done that also. Had any unauthorized person attempted to seize the case the accused would probably have disputed the attempt. He would have assumed authority to do these things as naturally arising out of his employment by Mock in the illegal transaction in which they were engaged. But even if Mock were not absent, the accused's possession or charge or control of the liquor was, to my mind, unquestioned. The word "possession" in sec. 91 does not mean ownership, but it and the words "charge or control" are of the widest application. When Mock put the case in the accused's vehicle, he put it in his charge or control, subject to his (Mock's) orders. I can see no reason for reading the word "exclusive" before the words "possession or charge or control" in the section, and, in my opinion, the Legislature intended nothing of the kind.

I have no doubt the magistrate was of opinion that Stein was acting in collusion with Mock, and I do not propose to question his judgment that Stein's version of the matter was not to be believed. Without seeing the accused in the box, his story, as it is set forth in the evidence, strikes me as having been constructed for the occasion. I would affirm the conviction.

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HAGGART, J.A.

HAGGART, J.A.—The charge is that the accused "did have liquor in a place other than in a private dwelling-house in which he resides contrary to the provisions of *The Manitoba Temperance Act.*"

I agree with the magistrate's observations made during the trial when he said:

I doubt if you have even made out a *prima facie* case here * * *, and as it stands at present, must I not dismiss the charge unless you have anything to say? It seems to me you must prove something more than that the accused had liquor in his possession, and that he knew it was liquor he had.

I think it would have been a proper disposition of the case if he had then dismissed the charge.

The accused then gave his evidence, which was briefly to the effect that pursuant to an arrangement made on the previous Saturday he met one Mock, who was to pay him $1 for delivering a parcel. Mock got into the rig bringing a bag which contained the case of liquor in question.

As to the parcel, Stein's evidence on cross-examination is:

Q. And who lifted this thing into your rig? A. Himself. I did not even see what he put there.

Q. He lifted it in. He did, and you never touched it? A. I not only never touched it, but I had never even seen it.

The man Mock got out of the rig to ascertain the number of the house which was the destination when the actual seizure was made, but they were a very short distance from each other. The magistrate thereupon apparently changed his mind and observes:

It seems to me at the time this liquor was seized it was in the possession of the accused. He was alone at that time, and he had it in his rig, and sec. 91 puts the onus on the accused to prove his innocence if he has liquor in his possession at the time it was seized.

With all due deference, I think the magistrate erred. Mock was then in possession. The liquor was never out of his possession, either actually or constructively, or possession ever delivered to the accused. He did not know the nature of the parcel. There is no evidence to show that he knew there was liquor in his rig. Mock brought the liquor into the rig with him and was to take it away with him. It was under the seat upon which Mock sat. The real offender and the only offend-

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er was Mock. He has been punished for his offence, and I think the Crown might well have withdrawn the charge. It was proved that the accused Stein never had actual physical possession. Mock had possession, and never parted with it.

A similar case was *Bigattini v. Dixon* [1919] 1 W.W.R. 464. In that case the appellant was charged with "having liquor in a place other than the dwelling-house in which he resided." One B. had some liquor in an unlawful place. He engaged appellant to move it, apparently with some other stuff, to another place. Appellant knew he was removing liquor. B. accompanied him during the removal. It was there held that the appellant was improperly convicted, and the word "have" as used in the Act, denotes possession and it must be an actual physical possession, which the appellant did not have.

The order absolute for the *certiorari* should be made, and the conviction against Stein quashed.

FULLERTON, J.A. concurs in quashing the conviction.

Conviction quashed, no order as to costs.

COURT OF APPEAL

GROSSENBACK v. GOODYEAR

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

Agreement of Sale of Land—Vendor Unable to Make Title—Rescission by Purchaser—Recovery of Moneys Paid—Vendor Acquiring Title after Action Brought by Purchaser.

A purchaser who has made all the payments, except the last, under an agreement of sale of land, and who is ready and willing and offers to make such last payment upon getting a proper conveyance of the land, may, if the vendor is unable to make a title, after a reasonable time, rescind the contract and recover the money he has paid.

In re Bayley & Shoesmith's Contract, 87 L.J. Ch. 626; *Harris v. Robinson*, 21 S.C.R. 390, and *Want v. Stallibras*, L.R. 8 Ex. 175, followed.

It is no defence to such a claim to show that after action commenced the defendant had acquired and was then in a position to furnish a good title.

A clause in the agreement of sale provided that the purchaser accept the title of the vendor and shall not be entitled to call for the production of any abstract or proof of title, etc., does not prevent the purchaser

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from objecting that the vendor had no title, because title is the foundation of the contract. 1919

Want v. Stallibras, supra; Baskin v. Linden, 24 Man. R. 459, and *In re Haedicke and Lipski's Contract* [1901] 2 Ch. 666 followed.

ARGUED: 10th July, 1919.

DECIDED: 23rd July, 1919.

In an action to rescind an agreement of sale of land and recover the purchase money as the vendor did not have title, judgment was given at the trial before Galt, J., in favour of the purchaser. The facts are stated in the headnote and judgment. Statement.

The appeal was allowed.

W. H. Trueman, K.C. and *H. J. Sutherland,* for defendant, appellant.

A. E. Hoskin, K.C. and *E. R. Siddall,* for plaintiff, respondent.

PERDUE, C.J.M.—The facts of this case are very fully set forth in the judgment of Galt, J. ([1919] 1 W.W.R. 730) from whose decision this appeal is brought. At the time the defendant entered into the agreement to sell to the plaintiff the lots in question, all that the defendant had in the way of title was an agreement entered into with one Dawnay in March, 1912, by which Dawnay agreed to sell these and other lots to the defendant on deferred payments, the last of which would fall due in the year 1917. Dawnay's interest in the lots was a right of purchase from one Hoddell, who was the actual owner, under an agreement dated February 19, 1912, by which Hoddell agreed to sell to Dawnay these and other lots on deferred payments, the last of which would fall due in August, 1917. Under the agreement between the plaintiff and the defendant the last payment to be made by the plaintiff fell due on September 18, 1916. All of the above agreements contained a clause enabling the purchaser to pay off the whole or any portion of the purchase-money without notice or bonus.

The plaintiff made all his payments except the last which fell due on March [September?] 18, 1916. The trial Judge is of opinion that the plaintiff discovered the defendant's lack of title shortly after that payment fell due. The plaintiff's solici-

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tor wrote to defendant on September 26, 1916, calling attention to the fact that the title stood in the name of Hoddell, with a caveat filed by Dawnay and a judgment registered against the latter. The defendant on September 29, wrote in reply that he did not know anything of Hoddell "until lately" when he searched the land titles office. On November 2, 1916, plaintiff's solicitor again wrote in regard to perfecting the title and threatening an action for specific performance or for the return of the purchase-money.

In 1917, Hilson, the plaintiff's agent, offered to pay the balance of the purchase-money, but defendant said he had not yet got title.

The learned trial Judge finds that defendant did not appear to have taken any pains to procure title or to pay what he owed to Dawnay. On October 12, 1918, plaintiff's agent tendered to defendant the amount due and demanded a transfer. Defendant stated he was not in a position to give title. On October 16, 1918, plaintiff's solicitors notified the defendant that the plaintiff, for the reasons set out in their letter, rescinded the contract and demanded the return of all moneys paid thereunder.

This action was commenced on October 21, 1918. The plaintiff sues for the return of the moneys paid under the contract. After the action was commenced the defendant made efforts to obtain title and shortly before the trial became in a position to furnish title to the plaintiff. The defendant then by his amended statement of defence alleged that he was able, ready and willing to give a conveyance in accordance with the terms of the agreement, and he counterclaimed for specific performance of the agreement. At no time between the making of the contract with the plaintiff and the commencement of the suit was the defendant in a position to furnish title. He had not even an equitable title. He had only an equity upon an equity. He had not paid Dawnay and was not in a position to demand a conveyance from him. But Dawnay himself had only a contract of purchase from Hoddell and was in default on his payments to the latter. The several contracts, Hoddell to Dawnay, Dawnay to the defendant and the defendant to

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the plaintiff, were quite independent of each other; there was no privity between the plaintiff and Dawnay or between the defendant and Hoddell. The plaintiff could not enforce the contract which Dawnay had with the real holder of the title. The later contracts were not, and cannot be treated as, assignments in whole or in part of the contract of purchase which Dawnay obtained from Hoddell, the registered owner of the land. The defendant had ample time given to him in which to furnish title, but up to the commencement of the suit he failed to do so. I think, therefore, that the plaintiff was entitled to rescind the contract on the ground that the defendant had not a title and to recover the purchase-money he had paid. See *Want v. Stallibras,* L.R. 8 Ex. 175, 42 L.J. Ex. 108. The present is a suit to recover money paid under an agreement for the purchase of land which had been rescinded because the vendor had failed to furnish a title to the land. It is no defence to show that after action commenced the defendant acquired title.

The agreement contains a clause that the purchaser accepts the title of the vendor to the land and shall not be entitled to call for the production of any abstract of title or proof or evidence of title, etc. A clause such as this does not prevent the purchaser from objecting to the title when it appears that the vendor had no title, because title is the foudation of the contract. See *Want v. Stallibras, supra; Armstrong v. Nason,* 25 S.C.R. 269; *Anderson v. Douglas,* 18 Man. R. 254, at p. 265, 9 W.L.R. 378; *Baskin v. Linden* (No. 2), 24 Man. R 459, 6 W.W.R. 1053, 28 W.L.R. 418; *In re Haedicke and Lipski's Contract* [1901] 2 Ch. 666, 70 L.J. Ch. 811.

In April, 1916, Dawnay who had enlisted and was going overseas signed a writing, stating that in consideration of getting a transfer of lots 17 and 18 he transferred, assigned, etc., to Hoddell all his "right, title, interest, equity and obligations" in the agreements of sale mentioned in the writing, one of them being the agreement between Dawnay and the defendant covering the lots sold by the defendant to the plaintiff. This writing was not signed by Hoddell and he was not bound in any way to release Dawnay and accept the defendant as pur-

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chaser. It affords no answer to the plaintiff's objection to the defendant's title.

I think the judgment of the trial Judge should be affirmed and the appeal dismissed with costs.

CAMERON, J.A.—I concur in the judgment of the Chief Justice which I have read, and in addition to the cases mentioned by him, I refer to *In re Bayley & Shoesmith's Contract*, 87 L.J. Ch. 626, cited on the argument. There by a contract for the sale of freehold property dated September 27, 1917, the date fixed for completion was November 1. The vendors having failed to show title by November 6, the purchaser on that date gave notice of repudiation unless a proper title was shown by November 11. It was held by Sargant, J. that the vendor's failure to comply with the notice entitled the purchaser to repudiate and recover the deposit. This decision seems to me to be very much in point. I also refer to *Harris v. Robinson*, 21 S.C.R. 390. The appeal must be dismissed with costs.

HAGGART and FULLERTON, JJ.A. concurred with Perdue, C.J.M.

Appeal dismissed with costs.

COURT OF APPEAL

IN RE THE PRUDENTIAL LIFE INSURANCE COMPANY

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

Winding-Up of Company—Winding-up Act, R.S.C., 1906, *Ch.* 144, *S.* 131A *added by* 6 & 7 *Edw. VII, Ch.* 51, *S.* 1—*Appointment of Solicitor to Represent the Shareholders—Payment of Costs out of Assets to Solicitors so Appointed—Costs of Work Done Prior to the Making of the Winding-Up Order—Alteration or Variation of Order Made by Single Judge—King's Bench Act, Rules* 662-664, 672.

There is no power in the Court or a Judge to award to the solicitor appointed, under the powers conferred by sec. 131A added to *The Winding-up Act* by 6 & 7 Edw. VII, ch. 51, sec. 1, to represent the shareholders in the winding up, costs incurred prior to the presenting of the petition for the winding-up order.

An order of a single Judge cannot be afterwards varied or altered materially except on appeal to the Court of Appeal under Rule 672 of *The King's Bench Act*, unless it comes within the provision of Rules 662-664,

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and a single Judge therefore has no power to make an order adding material and important provisions to a previous order which has not been appealed from.

Walker v. Robinson (1905) 15 Man. R. 445, at p. 449; *Re Gimli Election,* (No. 1) (1913) 23 Man. R. 678, at p. 696; *In re St. Nazaire Co.,* (1879) 12 Ch. D. 88; *Preston Banking Co. v. Allsup* [1895] 1 Ch. 141, and *Bright v. Sellar* (No. 1) [1904] 1 K.B. 6, followed.

ARGUED: 15th July, 1919.
DECIDED: 23rd July, 1919.

Statement.

APPEAL from an order of Prendergast, J. awarding to the solicitor for the shareholders, costs incurred prior to the presenting of the petition for the winding-up order. The appeal was allowed.

A. B. Hudson, K.C. and *H. V. Hudson,* for the liquidator, appellant.

J. H. Leech, K.C. and *F. J. Sutton,* for the respondents.

PERDUE, C.J.M.—I think, with great respect, that the order appealed from was beyond the powers of the learned Judge who made it. I have come to that conclusion upon two grounds. In the first place, under the amendment to *The Winding-up Act* passed in 1907, ch. 51, sec. 1, the Court is empowered to appoint a solicitor and counsel to represent the interests of the shareholders for the purpose of the proceedings. Prior to that enactment no such power existed. The amendment also enables the Court to provide for the payment of the costs of such solicitor and counsel, either by the order making the appointment or by a subsequent order. It is plain that the services of the solicitor and counsel are confined to the proceedings in the winding-up and that the Court or Judge has no power to award to the solicitor for the shareholders, costs incurred prior to the presenting of the petition for the winding-up order. The order appealed from clearly intended to award to Mr. Leech, as solicitor and counsel for the shareholders, payment for legal services rendered by him prior to the winding-up order. On that ground alone I think the order was beyond the powers of the learned Judge.

In the second place the order appealed from, although it purports to declare the intention of the orders of December 27, 1916, and February 22, 1916, adds very important provis-

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ions to these orders, especially the order of February 22. The provision I have already referred to relating to costs incurred prior to the winding-up, seems to me to be one which was not contemplated when the order of February 22 was pronounced. The procedure under a winding-up order is to be carried on as nearly as may be in the same manner as an ordinary suit within the jurisdiction of the Court: *The Winding-up Act,* sec. 108. The Rules of the Court of King's Bench are therefore to be applied in the present case. Any material variation or alteration in an order made by a single Judge, unless it comes within the provisions contained in Rules 662-664, can only be made on appeal to the Court of Appeal: Rule 672. See *Walker v. Robinson,* 15 Man. R. 445, at p. 449, 1 W.L.R. 181; *Re Gimli Election,* 23 Man. R. 678, at p. 696, 5 W.W.R. 363, 25 W.L.R. 677; *In re St. Nazaire Co.,* 12 Ch. D. 88, 41 L.T. 110; *Preston Banking Co. v. Allsup* [1895] 1 Ch. 141, 64 L.J. Ch. 196; *Bright v. Sellar* (No. 1) [1904] 1 K.B. 6, 72 L.J.K.B. 921. With great respect, I think that the learned Judge exceeded his powers in making the order from which this appeal is brought.

The order of February 22, 1916, in the form in which it was pronounced, drawn up, signed and entered appoints Mr. Leech counsel and solicitor for the shareholders and that appointment is declared to date as from the original winding-up order made on August 4, 1915. No appeal was entered against this order of February, 1916, and it has never been questioned by any judicial proceeding. It may be that the Judge in charge of the winding-up proceedings had power to made the appointment of Mr. Leech date from the making of the winding-up order, if he thought the justice of the case required that he should do so. In any event the order stands as drawn up and entered and cannot now be interfered with. The amending Act of 1907, ch. 51, gave the Judge power to deal with the question of costs. The last two clauses of the order direct that the costs of the counsel and solicitor for the provisional liquidator and of the counsel and solicitor for the liquidator and of the counsel and solicitor for the shareholders, up to the making of the order, and also their subsequent costs, be taxed and paid by the liquidator out of the assets of

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the company. Nothing is said as to these costs being taxed as between solicitor and client, if in a proceeding like the present there is any difference between "costs" and "solicitor and client costs." In any event the order makes no distinction between the costs to be taxed to the counsel and solicitor for the liquidator and those to be taxed to the counsel and solicitor for the shareholders. The plain intention is that the costs of each should be taxed on the same scale. Probably the interested parties will assist the taxing officer in deciding what that scale shall be.

The order appealed from should be set aside. The liquidator's costs of the appeal should be paid out of the assets of the company in his hands.

CAMERON, J.A.—I agree with the Chief Justice that the order made by Mr. Justice Prendergast dated April 16, 1918, was beyond his jurisdiction and must be set aside. Moreover, as the liability of the dissenting shareholders to their solicitor could not be imposed on the company and made its liability in any form of action, it would be remarkable if that liability could be made that of the company by a simple order in such a proceeding as that before us.

As to the meaning and effect of the orders of February 22, 1916, and December 27, 1916, neither of which has been appealed against, I say nothing as they are not before us for adjudication in any way.

HAGGART and FULLERTON, JJ.A. concurred.

Appeal allowed.

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COURT OF APPEAL

STEVENS v. THE MERCHANTS BANK OF CANADA

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

I. Banks and Banking. II. Agency.

I. Banks and Banking—Bank Manager Guaranteeing Repayment of Loan from Third Party to Bank's Customer—Ultra Vires of Bank.

The giving of guarantees for the debts of others is not part of "such business generally as appertains to the business of banking" and is not within the powers of a bank under *The Bank Act.*

Plaintiff loaned a firm which was a customer of defendant bank $10,000, taking as security for repayment certain post-dated cheques of the firm on the bank for said sum and as remuneration for the loan a further such cheque for $1,000, all cheques being payable within about four months. The local manager of the bank initialed these post-dated cheques and also gave plaintiff a letter stating that the bank was prepared to grant the firm a credit sufficiently large to enable it to take up the instalments of the $10,000 as they matured and guaranteed payment of the loan. The firm was heavily indebted to the bank in the bank's liability ledger. The plaintiff delivered the loan money to the local manager of the bank who placed it to the firm's credit in its current account and they were checked out in reduction of its current liabilities.

Held The letter or the initialing of the cheques did not make the bank liable. It is not within the ostensible authority of a local branch manager of a bank to make such a contract nor was it such business as is within the powers of a bank under *The Bank Act.* Nor did the bank receive such a benefit from the loan as to create a liability on its part.

II. Agency—Onus of Proof of Agent's Authority.

The onus of establishing the authority of an agent is upon the person who seeks to bind the principal.

ARGUED: 8th October, 1919.
DECIDED: 1st December, 1919.

Statement. Appeal by defendant from judgment of Macdonald, J. in favour of plaintiff in an action to enforce payment on certain cheques and a letter of guarantee. Appeal allowed with costs.

H. J. Symington, K.C. and *W. E. Davison,* for defendant, appellant.

I. Pitblado, K.C. and *E. R. Siddall,* for plaintiff, respondent.

PERDUE, C.J.M.—The facts in this case are fully set out in the judgment of Macdonald, J., before whom the case was tried. A motor business had been in operation in Winnipeg under the name of "The Winnipeg Motor Exchange Company." The business was owned by a Mrs. Robinson and conducted by her husband. It was not incorporated. In the lat-

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ter part of the year 1916, it became a customer of the defendant and soon became largely indebted to the bank. The account was kept at the main branch of the bank in Winnipeg, A. C. Paterson being the manager. Almost from the opening of the account the general manager kept urging that the loans to the company should be kept down. The indebtedness, however, increased rapidly and in August, 1917, amounted to from $30,000 to $35,000. During this period the head office had been constantly urging Paterson to get the account reduced. He made many promises but allowed the indebtedness to grow.

In August, 1917, Paterson was instrumental in bringing about a sale of the business by the Robinsons to two young men, Baxter and Martin, who were employees of the company. These young men put no money into the business. The consideration for the sale was the assumption of the liabilities of the business by Baxter and Martin. It appears, however, that $5,000 was paid by them to the Robinsons, the bank advancing the money. After the sale the business was conducted under the name of the Winnipeg Motor Company, but there was no improvement in the situation in so far as the bank was concerned. On October 6, 1917, the new business owed the bank on loans $27,693, besides a liability on trade bills of $15,309. On this date the Winnipeg Motor Company borrowed from C. C. Fields $7,500, giving him as security a note, a chattel mortgage, and a post-dated cheque for the full amount, the cheque being dated October 13, 1917, and bearing Paterson's initials in the lower left-hand corner. On the 8th of the same month Baxter approached Mr. Dalgleish, a solicitor, as to obtaining a loan. Dalgleish took up the matter with the plaintiff and her husband and after interviews between Dalgleish and Paterson, Stevens and Paterson, and the three of them together, a loan of $10,000 was made by the plaintiff to the Winnipeg Motor Company on October 15. The money was to be repaid as follows: $2,000 on November 15, 1917, December 15, 1917, January 15, 1918, and $4,000 on February 15, 1918. As security for the repayment of the loan, the Winnipeg Motor Company gave to the plaintiff four post-dated cheques on the defendant bank bearing the dates of the

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above instalments and for corresponding amounts. Paterson placed his initials on the lower left-hand corner of each cheque. He also signed and gave to the plaintiff the following letter:

The Merchants Bank of Canada,
Winnipeg, Man., October 15th, 1917

Mrs. Hattie Stevens,
Winnipeg, Man.

Dear Madam:

In connection with the loan of $10,000 which we understand you are granting to the Winnipeg Motor Company, to be repaid at the rate of $2,000 per month, and the balance at the end of four months, we beg to notify you that this Bank is prepared to grant the company a credit sufficiently large to enable them to take up these instalments as they mature, and hereby guarantees payment of the said loan.

Yours truly,
[Sgd.] A. C. Paterson,
Manager.

The Winnipeg Motor Company also gave to the plaintiff a cheque on the bank for $1,000 post-dated February 15, 1918, as remuneration for the loan. This cheque was also initialed by Paterson in the same manner as the others. The money received from the plaintiff was deposited to the credit of the company in its ordinary chequing account in the defendant's bank. Paterson reported to the head office the receipt of the $10,000 as "new capital invested." His connection with the bank was severed on November 1, 1917. The defendants refused payment of the cheques and denied liability on the alleged guarantee. The company was practically without assets.

The plaintiff brings this action to enforce payment on the guarantee and cheques.

The statement of claim is very lengthy and puts the plaintiff's case in several different ways.

Par. 3 alleges that the plaintiff at the request of the defendant and of Paterson, its manager, at the branch above mentioned, agreed to make the loan and sets out the manner in which it was to be repaid.

Par. 4: That the defendant or Paterson, its manager acting on its behalf, in consideration of the plaintiff indorsing the cheques she was issuing for the loan and delivering them to the defendant, promised that they would honour, accept and pay the cheques of the Winnipeg Motor Company, setting out

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the cheques, the initialing of the cheques as an inducement and indication of the promise and averring that the defendant thereby represented and warranted that the cheques would be accepted and paid.

Par. 5: That defendant for the consideration aforesaid promised to pay the sum of $11,000, $2,000 on November 15, 1917, or on presentation of a cheque, etc., and so on for each of the five cheques.

Par. 6: That plaintiff relying on the promise of the defendant or of its manager delivered her two cheques to the defendant or said manager and the defendant received the proceeds, being $10,000.

Par. 7: Money had and received.

Par. 8: A claim on the guarantee of October 15, 1917, "from the defendant or from the defendant's said manager on its behalf."

Pars. 9 and 10: Presentment and refusal.

Par. 11: Delivery to defendant, at its request, of plaintiff's cheques for $10,000 in consideration of defendant's promising and warranting that it would pay, etc., its refusal and consequent total failure of consideration.

Par. 12: That plaintiff was induced to loan to the Winnipeg Motor Company $10,000 on representations, warranties and promises by the defendant or by its manager on its behalf, setting out the several warranties, etc., relied upon, the plaintiff's reliance on same, breach, etc.

Par. 13: That the Winnipeg Motor Company, being largely indebted to defendant, defendant placed a person or persons in charge of the business in the interests of the defendant and for its benefit; that defendant or such person or person induced the plaintiff to lend the money ostensibly to the Winnipeg Motor Company but actually to be paid to defendant, which loan the plaintiff was induced to make "on the representations and warranties of the defendant by such person or persons and by the said manager of the defendant" and on the faith of the initialing of the cheques of the Winnipeg Motor

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Company and of the warranty of October 15, aforesaid; that the money was received by defendant, that it repudiates liability, etc.

Par. 14: That defendant is not entitled to retain the money and not carry out the representations, warranties, etc.

Par. 15: Estoppel by conduct.

Pars. 16, 17, 18, 19, 20: A claim upon each of the post-dated cheques given by the Winnipeg Motor Company as given to plaintiff for value and duly accepted by defendant.

Par. 21: That plaintiff is the holder of the aforesaid cheques of the Winnipeg Motor Company, that such cheques were signed on behalf of the company by the persons so placed in charge of the business by the defendant and were given for the purpose of such business.

The defendant in its statement of defence denies specifically all allegations in the statement of claim. It denies that the alleged guarantee of October 15, 1917, is binding upon it, not being under its corporate seal. In par. 16 it alleges that if Paterson did request the plaintiff to make the loan to the Winnipeg Motor Company, or if he promised or agreed to do the several things alleged in par. 4 or gave the writing referred to in par. 8 of the statement of claim, or if he promised or warranted that defendant would pay the cheques or if he made the representations, warranties, etc., referred to in par. 12, or if he induced the plaintiff to make a loan to the company or delivered to the plaintiff the cheques referred to in pars. 16-20 of the statement of claim; he

was not acting in the course of his employment as manager of defendant's branch, nor on its behalf, nor within the scope, or apparent scope, of his authority as the plaintiff well knew.

In par. 17 of the statement of defence, it is denied that the defendant had power to enter into the various transactions or to give the promises, agreements, warranties, etc., alleged in the statement of claim, or to carry on the business referred to in par. 13 thereof, or borrow money for the purposes alleged, and the defendant pleads the provisions of *The Bank Act*, 4 & 5 Geo. V., ch. 9.

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I have dealt with the pleadings at considerable length as it is necessary to have the issues before us when dealing with the course pursued at the trial and the attitude taken by the plaintiff.

The transactions, promises, representations, warranties on which the plaintiff relies are alleged to be those of the defendant or of the defendant's manager acting on its behalf. The authority of the manager to bind the defendant is specifically denied in the statement of defence. All the transactions in question in so far as they can affect the bank were carried out by the manager. The issue then upon which this case turns is —Had the manager authority to bind the bank in the acts and matters complained of and in the manner alleged in the statement of claim? The affirmative of this issue is upon the plaintiff. The production of a letter from the general manager of the defendants stating that Paterson had been appointed manager of the branch and the fact that he acted as such, are not enough to show that he had the extraordinary powers which the plaintiff must establish that he had, in order to render the bank liable in this action.

By sec. 29 of *The Bank Act* the directors may make by-laws and regulations not repugnant to the provisions of the Act, or to any by-law duly passed by the shareholders or to the laws of Canada, with respect to "(*b*) the duties and conduct of the officers, clerks and servants employed therein." By sec. 30 the directors may appoint as many officers, clerks and servants as they consider necessary for the carrying on of the business of the bank.

The burden of proving that the bank manager was acting within the scope of his authority is upon the party asserting it. This principle was much discussed in the recent decision of the House of Lords in *Banbury v. Bank of Montreal* [1918] A.C. 626, 87 L.J.K.B. 1158. In that case the plaintiff, an Englishman, went to Canada on a pleasure trip in 1911, and stayed with the general manager of the defendant bank, who gave him a letter of introduction to the branch managers asking them, if he applied for assistance or advice, to place themselves at his disposal. In 1912, he again visited Canada seek-

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ing investments and presented the letter of introduction to Mr. Galletly, the defendant's branch manager at Victoria, upon whose oral advice he invested $125,000 upon a mortgage to secure a loan to a company who were customers and debtors of the bank. The advice which was honestly given involved oral representations as to the credit of the company. The company having failed to pay interest or principal, the plaintiff brought an action against the bank for negligence and breach of duty while acting as his bankers and advisers. It was held by the majority of the Court, affirming the Court of Appeal, that there was no evidence upon which the jury could find that Galletly had authority to advise the plaintiff as to his investments, or that the bank owed any duty to advise him carefully or at all. Lord Atkinson in giving his judgment said, at p. 686 ([1918] A.C.):

> The burden of proving that Galletly, in giving advice, acted within the scope of his authority and in the course of his employment rested, of course, upon the appellant [the plaintiff]. And yet one would almost suppose from some of the questions put that the burden was reversed. For instance, a point was made and pressed that amongst the written rules of the bank for the guidance of managers there was no rule forbidding them to advise as to investments.

Lord Parker of Waddington pointed out that the statement of claim alleged that it was part of the bank's business to advise their customers as to Canadian investments, that the appellant was a customer of the bank, that the bank through their manager advised him to make the investment in question, that he made it relying on the advice, that the advice was negligently given and that by reason thereof he lost his money. Lord Parker said at p. 702 ([1918] A.C.):

> On this statement of claim, the appellant had to prove *in limine* that it was part of the business of the bank to advise their customers with regard to Canadian investments. If he established this, he need not trouble further as to the authority of the manager. The scope of such authority would be coincident with the scope of the bank's business. If such business included advice as to investments, the manager would have a general authority to advise on investments on the bank's behalf.

I would also refer to the judgments in the Court of Appeal in the *Banbury Case, supra* [1917] 1 K.B. 409, 86 L.J.K.B. 380, particularly that of Cozens-Hardy, M.R., at p. 420, Warrington, L.J. at p. 423, Scrutton, L.J. at p. 437.

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In *Pole v. Leask,* 33 L.J. Ch. 155, 9 Jur. (N.S.) 829, Lord Cranworth said (p. 162):

> Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.

And again (p. 163):

> Where it is sought to make out a constructive agency, or to extend by implication an agency admitted or proved to exist for some purposes, to others, my judicial leaning is in favour of the party sought to be charged. The party who seeks to establish such a case ought to be held to strict proof.

The rule above stated is supported by numerous American authorities: See *Corpus Juris,* vol. 2, p. 925.

Mr. Symington, counsel for the bank, tendered in evidence at the trial the printed rules and regulations of the bank to be observed by its bank managers and the staff in general. These rules and regulations were in Paterson's possession. Rule 104, described as the rule showing the limitation of the authority of a branch manager, was specially tendered. The putting in of all or any of the rules was strenuously opposed by Mr. Pitblado, counsel for the plaintiff, on the ground that the rules and regulations had not been brought to the attention of the plaintiff. During the long discussion that ensued the trial Judge put two questions to Mr. Pitblado and received the answers thus reported in the evidence:

> His Lordship: Do you contend, Mr. Pitblado, that there was any actual authority?
>
> Mr. Pitblado: The authority upon which we rely is the authority we have put in here, that is, the appointment of this man as manager of the bank, and his acting as such manager.
>
> His Lordship: Any other authority?
>
> Mr. Pitblado: None other than that.

The trial Judge refused to allow the rules and regulations to be received in evidence. With respect, I think they should have been admitted. In the *Banbury Case, supra,* the written rules of the Bank of Montreal for the guidance of managers were received as evidence of the authority, or the limitation of authority, of the bank manager: See [1918] A.C. at p. 686. The ground of objection taken, that the rules and regu-

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lations had not been brought to the attention of the plaintiff was, in my opinion, invalid. The onus was, however, on the plaintiff to prove the manager's authority, and the evidence of authority relied upon by plaintiff's counsel was far from sufficient to bind the defendant in respect of the acts complained of.

I will now consider the letter of October 15, 1917, which constitutes the guarantee alleged in pars. 8 and 12 of the statement of claim. In so far as the writing purports to be a guarantee of the debt of a third party it is not binding on the bank. No authority to the agent to give such a guarantee was proved. I doubt whether the general manager of the bank could have bound the bank if he had signed the letter in the way the local manager signed it. The seal of the bank was not affixed and there is nothing shown which dispenses with the sealing of the instrument. Sec. 76 of *The Bank Act* deals with the business and powers of a bank. The first part of the section states what a bank may do. The only clause which by any possible construction could authorize the giving of a guarantee is (*d*), which provides that the bank may "engage in and carry on such business generally as appertains to the business of banking." Now, the nature of the business of banking is part of the law merchant. and will be judicially noticed by the Courts: *Falconbridge on Banking and Bills of Exchange,* 2nd ed., p. 175. In *In re Southport and West Lancashire Banking Co.,* 1 T.L.R. 204, it was held by the Court of Appeal (Baggallay, Bowen and Fry, L.JJ.) that it is not within the ordinary scope of a bank manager's authority to guarantee the payment of a draft. Baggallay, L.J. pointed out that there was no evidence to bring this particular line of business within the scope of the business of the company. Bowen, L.J. said that if the giving of the guarantee was not authorized by the memorandum of association the whole thing was at an end. He also referred to the necessity of evidence of authority.

In *Bank of Commerce v. Jenkins,* 16 O.R. 215, it was held by the Common Pleas Division that the execution of a deed of composition by a bank manager on behalf of the bank was not binding on the bank, the corporate seal not having been used.

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In England a bank may have power to guarantee the payment of money if its deed of settlement is broad enough to cover the transaction: *In re West of England Bank, Ex parte Booker,* 14 Ch. D. 317, 49 L.J. Ch. 400. But under *The Bank Act* of this country no such power is given to a chartered bank.

I have no hesitation in holding that Paterson had no power to give the guarantee in question.

But Mr. Pitblado argues that the letter of October 15, 1917, contained "an original promise" to provide funds to pay the instalments of the loan as they matured and that this was binding on the bank. He cited *Sutton v. Grey* [1894] 1 Q.B. 285, 63 L.J.Q.B. 633. In that case the plaintiff had accepted bills at the request of the defendant who promised to put the plaintiff in funds to meet the bills, the promise was held to be an indemnity and not a guarantee and so not within the statute.

In the present case the letter of October 15 contains a promise by the bank to provide a credit large enough to enable the Winnipeg Motor Company to pay the instalments when they become due, but there is added to this promise an unqualified guarantee by the bank for payment of the loan. It is not an indemnity without a guarantee, but a promise to furnish credit and also a straight guarantee.

In *Simpson v. Dolan,* 16 O.L.R. 459; *Adams v. Craig,* 24 O.L.R. 490, 2 O.W.N. 857, and *Ontario Bank v. McAllister,* 43 S.C.R. 338, and other cases, the bank in each case received some benefit from the transaction, a circumstance which, as I shall show, distinguishes all of them from the case at bar. But the main feature which separates this case from all the authorities cited is the utter folly and improvidence of the transaction in so far as the interests of the bank were concerned. It is hard to understand the conduct of Paterson. In spite of instructions to the contrary from the general manager, he had allowed the Winnipeg Motor Exchange Company to become heavily indebted to the bank. Then when the prospects of the business were desperate, instead of closing down upon it he loaned Baxter and Martin $5,000 of the bank's money to buy out the bankrupt concern and assume its liabilities, they not

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putting in any additional capital. Then when the business under its new control and new name of the Winnipeg Motor Company, continued to lose money and become more hopelessly involved, Paterson, in order to help it and at the same time to conceal the advances from the knowledge of the general manager, commenced the practice of initialing post-dated cheques of the company to enable it to borrow money. The Fields cheque for $7,500, post-dated and initialed by Paterson was outstanding when the transaction with the plaintiff took place, and that cheque was paid, in part at all events, with the plaintiff's money. On October 15, the company was in great need of funds. The Fields' cheque was due and there was not enough money in the account to meet it. There were other payments also to be made. Dalgleish, the plaintiff's solicitor, admits that he was told by Paterson that the Winnipeg Motor Company was heavily indebted to the bank, that they had a line of credit at the bank and did not want to exceed it. Dalgleish then on behalf of the plaintiff arranged the loan to the company. The result was an arrangement whereby the bank, which would not itself lend more money to the company, was to be made liable on the guarantee and the cheques for $11,000, loaned by the plaintiff to the company. Putting it in other words: the bank, which would not lend the company money in the ordinary course of bank business and at the rate of interest allowed by *The Bank Act,* was to become liable for a loan of $10,000 and for a sum charged by way of interest which works out at over 40 per cent per annum. Paterson acted in a very suspicious manner. He concealed the real transaction from the bank. In his report to the head office he designated the transaction as "new capital invested." No copy of the letter of guarantee was kept in a letter book or on the files in the bank. He kept a duplicate of it himself but, as he states, when he left the bank he destroyed a lot of papers and supposes that it was amongst them. The transaction was carried out at Dalgleish's office and not at the bank. Paterson there received the plaintiff's cheques for $10,000 and handed over the letter and the post-dated cheques of the Winnipeg Motor Company. He then returned to the bank and deposited the cheques to the credit of the company in its ordin-

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ary deposit account where the proceeds could be drawn out by Baxter and Martin. No record of the transaction appeared in the bank's books and no entry was made in the bank's books or records of the initialed cheques handed to the plaintiff and outstanding as a liability of the bank.

The plaintiff had her solicitor and her husband, who is an experienced business man, advising her. From what they knew of the transaction and of the parties and of the surrounding circumstances, they must have been aware that something more than suspicious was taking place, that, in fact, something irregular and fraudulent was being perpetrated at the expense of the bank. The form of the transaction—a guarantee by the bank of a loan at 40 per cent per annum, when it would not itself lend any more money to the borrowers, the initialing by the bank manager of cheques for large amounts dated months ahead—was enough to awake the suspicions of any person with ordinary business sense and to warn him or her that there was something unusual, something wrong, and to have nothing to do with it.

Now as to the initialing of the post-dated cheques, the burden of proving the authority of Paterson is still upon the plaintiff. The experienced bankers who gave evidence testified that it was not within the ordinary course of banking business in Canada for a bank to agree to cash post-dated cheques of a customer in circumstances similar to those in this case. There is nothing said in the letter of October 15, about the cheques or the initialing of them. Dalgleish as solicitor for the plaintiff arranged the conditions of the loan. When he was under cross-examination he was asked by the trial Judge: "Did you lend on the strength of the letter?" To this he answered: "Yes." Paterson said that putting the initials on the cheques was just a confirmation of what he said in the letter. Then the question was put to him: "And you complied with that object in view?" To this he answered:

> And I complied. As a matter of fact I knew that my initials on the cheque would not make the cheque good alone, but I had given him the letter, so I did not see any reason why I should not put my initials on them.
>
> Q. Although you felt that the putting on of your initials did not mean anything more than your letter already indicated? A. Yes.

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It would appear from this evidence that the guarantee for the payment of the loan, the promise to provide funds to meet the instalments and the initialing of cheques representing the instalments are all part of the same purpose, namely, that the bank should be surety for the Winnipeg Motor Company, or guarantor for the repayment of the loan.

The attempt that was made to show that the business of the Winnipeg Motor Company was in reality the business of the bank, and that Baxter and Martin were merely conducting it on behalf of the bank, completely fails. The agreement of August 14, 1917, in which Mrs. Robinson, the owner of the business of the Winnipeg Motor Exchange Company, agreed to sell the business to Baxter and Martin and they to buy it on the terms set forth, puts it beyond question that there was an acual sale to these parties. Dalgleish's evidence shows that he negotiated the loan to the Winnipeg Motor Company at the request of Baxter and for the company. There was no suggestion at the time that the bank was the borrower. A moment's consideration of the proposition shows its futility. Can it be conceived that the Merchants Bank of Canada would take over a business like the one in question and then, instead of the bank itself advancing the necessary money to keep the business going, would borrow money for the purpose from a private person on the terms and at the usurious rate of interest demanded in this transaction? It is safe to say that no Canadian chartered bank would be a party to such an improvident course of business. If a branch manager attempted to commit the bank to such a transaction his authority to do so would have to be established by the clearest evidence.

It is said that a post-dated cheque is equivalent to a bill payable after date: *Maclaren on Bills, Notes and Cheques,* 4th ed. 89, citing *Forster v. Mackreth,* L.R. 2 Ex. 163, 36 L.J. Ex. 94; *Royal Bank of Scotland v. Tottenham,* [1894] 2 Q.B. 715, 64 L.J.Q.B. 99. But it follows that in order to bind the bank as drawee the bill must be accepted by the bank. By sec. 36 of *The Bills of Exchange Act,* R.S.C., 1906, ch. 119, the acceptance must (a) be written on the bill and be signed by the drawee, or (b) the signature of the drawee must be writ-

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ten on the bill. Neither of these requirements was complied with. There is nothing on the face of the cheques that could be construed as an acceptance. There is nothing to show that the manager's initials on a post-dated cheque constitute an acceptance by the bank. Paterson's opinion was that the placing of his initials on the cheques would not of itself make the cheques good, that is to say, binding on the bank.

It was argued that the letter of October 15 contained a promise to honour the cheques and that the promise was equivalent to a letter of credit. But I think the difference is obvious. The issue of letters of credit is a legitimate part of the business of bankers and a well-recognized means of transmitting money: *Falconbridge on Banking and Bills of Exchange,* 2nd ed., p. 418. There was no such purpose intended in the present case. The letter was given as a security for an advance of money made to a customer of the bank by a third person and repayable in the future. It was a guarantee of a present loan and not a letter of credit.

The learned trial Judge has found that had the money been paid to Baxter and Martin and the bank had received no benefit, there would be no liability on the part of the bank, "as the manager acted beyond the scope of his authority, a position which the plaintiff must be held to have known." But the trial Judge finds that, because the plaintiff's money was deposited by the bank manager to the credit of the Winnipeg Motor Company, and because the post-dated cheque given to Fields by the company and initialed by Paterson was paid out of the plaintiff's money, the indebtedness of the company to the bank was reduced by that amount. He also finds that the indebtedness of the company to the bank was reduced by the deposit of the $10,000, although this money was paid out almost at once.

The evidence establishes that the plaintiff's money was loaned to the Winnipeg Motor Company. When Paterson received the plaintiff's cheques for the $10,000 at Dalgleish's office he was acting on behalf of the company. He then deposited the money in the company's ordinary account and within two days the company paid out the whole amount.

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The bank received no benefit from having the money pass through its hands. It was not liable on the Fields' cheque as the trial Judge appears to think. As I have shown, the mere placing of the manager's initials on that cheque was not enough to make the bank liable. Fields received from the company security for the loan. He states positively that it was not a loan to the bank. He knew it was a loan to the company. He thought the putting of the bank manager's initials on the cheque would operate as a guarantee that the cheque would be paid. His belief as to the effect of the initials on the cheque was erroneous. He had no claim against the bank. There is nothing to show that the bank received any benefit from the payments made with the plaintiff's money. The rest of the $10,000 was paid out by the company on different accounts but none of it went to the bank and the indebtedness to the bank was in no way reduced by the loan.

I have much sympathy for the plaintiff who was led into making an unwise investment, but I cannot see how her claim against the bank can be supported. The appeal must be allowed and the plaintiff's action dismissed with costs in both Courts.

CAMERON, J.A.—His Lordship, the Chief Justice, has dealt with the facts and the evidence.

My conclusion is that the loan of $10,000 was made to the Winnipeg Motor Company and not to the Merchants Bank as principal. The written evidence is unassailable. We have the agreement of sale, the five cheques, the note for $11,000 and the letter of guarantee, all of which carry the one meaning that the contract of lending was made with the motor company and the other evidence fully substantiates this view. The idea of lending money to the Merchants Bank at 40 per cent is an absurdity and was never entertained by any of the parties to this transaction, until the cheques were repudiated and the necessity for explanations arose. A perusal of the evidence has left this impression most distinctly on my mind.

In the result the advance was made to the Winnipeg Motor Company and the bank appears as responsible for its guaran-

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tee as set out in the letter. That letter embodied the negotiations in their final form and became the contract entered into and into which the previous promises or undertakings made by Paterson were merged.

The action is brought on the letter which is set out in the statement of claim, but the cause of action is put in several alternatives. It is, in one form, based on the cheques which it is alleged were accepted, or promised to be accepted, and paid. But while this alters the contract as alleged in form it does not do so in substance. It still remains a contract, on the part of the bank, to become responsible for and to repay the advance made to the Winnipeg Motor Company if the various amounts are not repaid by the motor company to the plaintiff at the times agreed on. Whatever form is given to the contract in the pleadings does not vary it in its essence. The promise or undertaking or warranty or whatever term may be used to designate the transaction is still a contract purporting to bind the bank to become responsible for the debts or defaults of the motor company in respect of its promises to pay and nothing else and this is what was in the minds of the parties beyond any doubt in my mind.

Was such a transaction as this within the powers of the bank? The circumstances of this case distinguish it from that dealt with in *Ontario Bank v. McAllister,* 43 S.C.R. 338. There the McAllisters were heavily indebted to the bank and a settlement was effected by which they were discharged from liability upon paying the bank $10,000 and transferring to it all their assets. Agreements were entered into for the liquidation of the property and the immediate question to be decided was the liability of the bank for rent under the lease of the mill property held by the defendants. It was held that, in view of the provisions of *The Bank Act,* 3 & 4 Geo. V., ch. 9, the carrying on the business for the purposes provided for was not *ultra vires* of the Act. As I view the facts in the present case there is no such question here. The bank was not in this case carrying on the business of the Winnipeg Motor Company for the purpose of liquidation or any other purpose. The business was and remained that of Baxter and

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Martin. The question of *ultra vires* that arises here relates only to the power of the bank to make such a contract as that which forms the basis of action in this case.

In the *McAllister Case, supra,* it was argued that the transaction came within sec. 76 (2) of *The Bank Act,* prohibiting the bank from buying or selling goods, wares and merchandise or engaging in any trade or business. But it was held that the subsection did not cover an isolated transaction, such as was involved in the assumption of the lease, entered into only for the purpose of settling an overdue debt. Here we have no such circumstances and no question arises as to the right of the bank to carry on a business in them. The question here does not involve any of the prohibitions in sec. 76, but is whether or not the bank was authorized to enter into the contract, agreement or undertaking on which it is sought to be made liable by virtue of subsec. (*d*) of sec. 76, which provides that it may engage in and carry on such business generally as appertains to the business of banking. We can look at all the decisions of the Judges of the Supreme Court in the *McAllister Case, supra,* as of assistance in arriving at a conclusion.

In the *McAllister Case, supra,* the Chief Justice held that the assumption of the lease was an isolated transaction entered into to realize an indebtedness legally contracted and therefore within its powers. Mr. Justice Davies (now Chief Justice) held that, as the substance of the transaction was the *bona-fide* settlement of a past due debt, the assumption of the obligation of the lease is impliedly authorized by subsec. (*d*) of sec. 76, to avoid a possible loss. Mr. Justice Idington concurred but did not consider the issue of *ultra vires* raised on the pleadings. Mr. Justice Duff dissented. He held that there were two questions involved:

> 1st: Does the transaction fall within the prohibition found in subsection 2 (*a*); and 2ndly: Can it, having regard to the provisions of the Act as a whole, be brought within sub-section 1 (*d*)?

His opinion is that it is impossible to imply authority in a bank to take over specific property in such circumstances as to involve the bank in the necessity of carrying on the business

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to enable it to realize its debt under subsec. 1 (*d*) when read with subsec. 2 (*a*).

The ultimate purpose was to realize the debt; but to do so by carrying on the business until it could be sold as a going concern.

The latter he held to be within the statutory prohibition and the purchase of the business with that illegal object in view was invalid. Mr. Justice Anglin, also dissenting, says:

I see no escape from the conclusion that the carrying on of the milling business of the bank was a prohibited engaging in trade or business.

Mr. Justice Duff refers to the decision in *Radford v. Merchants Bank*, 3 O.R. 529, where it was held that it was *ultra vires* for a bank to take over unfinished goods, finish them, and then sell them, with a view of preventing a loss in respect of a loan, and points out that the Act, though several times re-enacted since the date of that decision, has not been altered in its relevant provisions.

In the result the Chief Justice and Mr. Justice Davies held that the bank, in assuming the lease as necessarily and properly incidental to the carrying on of the business for the purpose of realizing a lawful debt, was acting within its powers. Mr. Justice Idington concurred in the result but refrained from discussing the question of *ultra vires*. And Mr. Justice Duff and Mr. Justice Anglin held the whole dealing, the acquisition of the property and the assumption of the lease, beyond the powers of the bank. It may well be conceived that, had the question of the lease alone been before the Court, separated altogether from the special circumstances in which and owing to which the bank acquired the lease, there would have been a unanimous decision that such a transaction was *ultra vires*. There was here no carrying on of the business of the motor company by the bank to which the contract, the subject-matter of this action, can be ascribed as a proper or necessary incident in the effectual carrying out of the liquidation of the motor company's business. This transaction was quite independent of such considerations. The bank's undertaking was given as security for the repayment of the loan made by the plaintiff to the Winnipeg Motor Company to enable it to carry on its business as a going concern. As I view

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the judgments in the Supreme Court in the *McAllister Case, supra*, they are authority for the contention that the bank had no power to enter into such an undertaking or contract as that on which this action is brought and that the alleged undertaking or contract made by the manager was wholly void and inoperative.

I believe it has been the intention of Parliament, in the interest of shareholders, depositors and the public generally, not to extend unduly the powers of banks but to keep them within well-defined and well-understood limits. Mr. Falconbridge in his work, at pp. 177 *et seq.* gives an enumeration of the powers of a bank and they are all well known to the public. But in none of them can we find authority for holding that the giving of guarantees or of undertakings by a bank to become responsible for the debts of others has been part of "such business generally as appertains to the business of banking." If it be conceded that a bank has such power, the bank might be made liable to an enormous extent, through guarantees and other contracts of that kind, and this without that liability being disclosed to the public or to the shareholders or even to the principal officers of the institution. I cannot imagine that it was intended to leave the door open for such dangerous operations. They are so foreign to what is ordinarily considered the legitimate business of banking that if Parliament decided to give them such unusual powers it would have left it no matter of remote and obscure inference, but have set forth the powers in so many words with safeguarding provisions. In my judgment the bank had no power to enter into the contract on which it is sought to be made liable in this action.

I refer to *In re Southport and West Lancashire Banking Co.*, 1 T.L.R. 204, where Lord Bowen says: "If the giving of the guarantee was not authorized by the memorandum of association the whole thing was at an end."

In my view, the giving of the guarantee or undertaking in this case was unauthorized by *The Bank Act*, and that disposes of the whole case. There could be no ratification of such a void contract by the agent or by the bank itself.

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On the argument before us it was urged: (1) That the bank is liable on the promises or agreements made by its manager, and that the agreements made by him were within his real or ostensible authority; and further, that the cause of action is not a guarantee but a direct promise and, even if it be a guarantee, it was within his agency; (2) That the initialing of the cheques constituted acceptance, or, in any event, a promise to accept and pay; (3) That the bank is liable for the representations made by the manager even if these were false or fraudulent; (4) That, independently of the cheques and letter, as the bank had put these men in charge of the business it is liable on the manager's verbal promises, and, *a fortiori,* in view of the cheques and the letter; (5) Also that even if the manager lacked authority there was ratification by the bank in keeping the money and, in any event, the bank is bound to return the money received.

As to the first ground, the facts of the case do not bear it out in the view I take of them. The transaction must be viewed as a whole. The substance of the alleged contract was expressed in the letter of guarantee on which the money was advanced by the plaintiff and the initialing of the cheques was merely auxiliary to it. And I can look at the transaction in no other way than as an attempt to create a guarantee by the bank that it would make good the instalments agreed on if they were not met by the motor company as they matured. A contract, undertaking or agreement of such a character is, as I have stated, in my opinion, beyond the powers of the bank and no authority could be given by it to an agent to enter into it.

We were referred to a number of cases on this branch. *Sutton v. Gray* [1894] 1 Q.B. 285, 63 L.J.Q.B. 633, deals with a case where a contract was held not to be a guarantee because both parties were interested in the subject-matter, and *The Statute of Frauds* did not, therefore, apply. *Simpson v. Dolan,* 16 O.L.R. 459, and *Adams v. Craig,* 24 O.L.R. 490, 2 O.W.N. 857, were also pressed on our attention. But in those cases the bank was directly interested in the proceeds of the transactions out of which the liability arose. It is to be noted

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that *Simpson v. Dolan, supra,* was decided before the *McAllister Case, supra,* which is not mentioned in *Adams v. Craig, supra.* These cases and others cited to support the plaintiff's view are, to my mind, clearly distinguishable from the state of facts presented in the evidence before us.

As for the initialing of the cheques, I look on that as a subordinate feature of the matter. Such initialing is usually nothing more than an indication by the manager to the ledger-keeper to pay the cheque even if the customer's account is overdrawn. See judgment of Middleton, J. in *Scott v. Merchants Bank,* 2 O.W.N. 514. But I cannot see what, if any, significance can be attached to initials on a post-dated cheque. And if they do convey the meaning of a promise to accept and pay, we come back to the real transaction that the bank is to guarantee the payment if the motor company fails to meet the cheques. It was argued that representations made by the agent, even if fraudulent, bind the principal, and, as a rule, this is the law. The word "representations" is used in the pleadings and was used on the argument, but "promise" is what is meant. But if there were representations of facts that affected the plaintiff, they are futile if made in reference to a matter beyond the bank's powers. But it is impossible, in my opinion, to rely upon the verbal promises of the manager when the contract has been reduced to writing in the form of the letter. Even if they could be relied upon, the plaintiff once again returns to the position of seeking to enforce a guarantee, verbal this time, made by the manager as agent for the bank which had no power to enter into it. From this standpoint there can be no ratification of the manager's action for there can be no ratification of an *ultra-vires* contract.

Transactions which are absolutely illegal or *ultra vires* cannot be ratified, or rendered binding by acquiescence. [*Brice, Ultra Vires,* p. 633].

The claim is urged that, in any event, the money must be returned.

A corporation must, in every case of an *Ultra Vires* engagement entered into in *bona fide* account for any benefit derived by it from the engagement [*Brice,* p. 648].

But the receipt by the bank of the proceeds of the loan in this case, solely, as I have pointed out, for the purpose of im-

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mediate distribution amongst the creditors and nominees of the motor company cannot be deemed a benefit received by it. To my mind such a contention is impossible. It might as well be argued that if the manager had cashed the cheques and personally paid over the bank bills to Baxter and Martin the bank had received the benefit.

Such being the facts as I view them, the cases cited to establish the right to recover moneys advanced in contravention of the statute, such as *Rolland v. Caisse d'Economie,* 24 S.C.R. 405, and *Canadian Bank of Commerce v. Macdonald,* 3 W.L.R. 90, have no application.

It was argued that the bank had an interest and received a benefit inasmuch as it was to the advantage of the bank that the business should continue and prosper, and, as Baxter and Martin got the money, the bank ultimately got some benefit. But such an interest or benefit is too indirect, remote and speculative to be seriously considered as affecting the legal relations of the parties interested. This case differs entirely from cases cited where a direct interest in the business or benefit received has been held a decisive factor in fixing liability.

It is not to be overlooked that the burden of proof of the power of the bank, as well as that of the authority of its agent, rests upon the plaintiff. This proposition is clearly laid down in *Banbury v. Bank of Montreal* [1918] A.C. 626, 87 L.J.K.B. 1158, and in *Pole v. Leask,* 33 L.J. Ch. 155, at pp. 160-161, 9 Jur. (N.S.) 829. For reasons I have given the plaintiff has failed to meet this just and entirely reasonable rule.

In my opinion the judgment for the plaintiff must be set aside, the appeal allowed and the action dismissed. The bank must have its costs in this Court and in the Court below.

HAGGART, J.A.—The statement of claim alleges that the plaintiff at the request of the defendants, and of the defendants' manager at Winnipeg, agreed to make a loan to the Winnipeg Motor Company of $10,000 to be repaid by certain instalments, and the defendants, or their manager, in consideration of the plaintiff endorsing the cheques she was issuing for the said $10,000, promised and agreed with the plaintiff to

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honour and pay certain cheques to be drawn by the Winnipeg Motor Company.

The defendants' manager, in order to induce the plaintiff to make the loan placed his initials on the corner of the cheques of the Winnipeg Motor Company so representing that the cheques of the Winnipeg Motor Company would be accepted and paid by the defendants.

The plaintiff, relying upon the promise of the manager, delivered two cheques of her own to the defendant bank, amounting in all to the sum of $10,000. The plaintiff also sued for money had and received and the letter given by the defendants' manager to the plaintiff at that time is in these words: [See *ante*, p. 48.]

The plaintiff alleges she made the loan of the said $10,000 relying upon the promise, warranty or guarantee of the defendants contained in the said writing.

Upon the trial of the action Mr. Justice Macdonald entered a verdict for the plaintiff for $10,000.

In the pleadings, and in their grounds of appeal, the defendants repudiate all liability, and specially allege that it was beyond the power of the defendants or their manager to give any guarantee or make any such contract as that sued upon.

In *Falconbridge on Banking and Bills of Exchange* in the second edition, commencing at p. 177, there is a very instructive chapter on the business and powers of a bank, and in that chapter there are references to many of the later cases in our own Courts, and the text writer says:

A bank chartered under the Bank Act, in addition to being a corporation with certain specified powers and subject to certain specified restrictions, is by sec. 76 of that act authorized to engage in and carry on such business generally as appertains to the business of banking.

In this case we must take the statute creating the corporation. Bowen, L.J., in discussing this question in his reasons for judgment in *Wenlock (Baroness) v. River Dee Co.*, 36 Ch. D. 675, at p. 685, says:

What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found

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the definition of this new creature. [We are told] it is no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had.

This bank is one of those named in the schedule to *The Bank Act*, 3 & 4 Geo. V., ch. 9, and the following provisions of that Act applies to it:

4. The charters or Acts of incorporation, and any Acts in amendment thereof, of the several banks enumerated in schedule A to this Act are continued in force until the first day of July, one thousand nine hundred and twenty-three, so far as regards, as to each of such banks,—

(*a*) the incorporation and corporate name;

(*b*) the amount of the authorized capital stock, if the same has not been increased or decreased, but if increased or decreased, then as increased or decreased before the passing of this Act;

(*c*) the amount of each share of such stock; and,

(*d*) the chief office;

subject to the right of each of such banks to increase or to reduce its authorized capital stock in the manner hereinafter provided.

2. As to all other particulars this Act shall form and be the charter of each of the said banks until the first day of July, one thousand nine hundred and twenty-three.

Along the same lines when discussing a similar subject, Lord Macnaghten in *Amalgamated Society of Railway Servants v. Osborne* [1910] A.C. 87, at p. 94, 79 L.J. Ch. 87, says:

It is a broad and general principle that companies incorporated by statute for special purposes, and societies, whether incorporated or not, which owe their constitution and their status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned.

At p. 97 ([1910] A.C.) Lord Macnaghten further says:

The learned counsel for the appellants did not, as I understood their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the Legislature. They said it was a power "incidental," "ancillary," or "conducive" to the purposes of trade unions. If these rather loose expressions are

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meant to cover something beyond what may be found in the language which the Legislature has used; all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use.

As to what the banks are prohibited from engaging in, I would refer to sec. 76, subsec. 2 of *The Bank Act*:

Except as authorized by this Act, the bank shall not, either directly or indirectly,—

(*a*) deal in the buying or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever;

(*b*) purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; or,

(*c*) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

I do not think that the transaction set out in the statement of claim is one which a bank or its manager had any authority to engage in. The objection taken by the defendants in the pleadings and in the notice of appeal is well taken, and I think that the verdict entered by Mr. Justice Macdonald should be set aside, and the action dismissed.

I do not think that the giving of this guarantee or the entering into the undertaking by the bank was incidental to the business of banking. It is plain that the object of the bank manager was to infuse new life into the business concern in which the bank was interested as a creditor. The actions of the parties plainly show what their intentions were.

For the foregoing reasons and for the reasons set forth by the Chief Justice in his written judgment, I would allow the appeal.

FULLERTON, J.A.—Apart from the question of ratification the real point involved in this appeal is the power of the bank to give the guarantee.

The powers which a bank may exercise are set out in sec. 76 and following sections of *The Bank Act*, ch. 9 of 3 & 4 Geo. V.

No power to give guarantees is specifically given by *The Bank Act*. Any such power must be derived by necessary implication from the words of the Act.

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The only words in the Act which can possibly be appealed to are the words in sec. 76, subsec. 1 (*d*): "Engage in and carry on such business generally as appertains to the business of banking."

The question then is whether these words by necessary implication give the bank power to guarantee the repayment of a loan by a third party to a customer of the bank.

When it is remembered that the bank itself is given specific power to loan money and that the loaning of money to its customers is in fact its chief business, it is difficult to discover any ground for implying a power to guarantee the repayment of loans made by others.

The case of *In re Southport and West Lancashire Banking Co.*, 1 T.L.R. 204, is in point.

There Chadwick & Co. had purchased from Bath & Sons a quantity of copper. Bath & Sons required that the draft they were making for the purchase-price should be guaranteed by a bank. Chadwick & Co., who were customers of a branch of the Southport & West Lancashire Banking Co., requested the manager of that branch to give the required guarantee. The guarantee was accordingly given. Bath & Sons claimed to prove in the liquidation of the bank upon the guarantee.

Chitty, J. held that the giving of such a guarantee was not within the ordinary scope of banking business, and refused to admit the claim. An appeal from his refusal was dismissed by the Court of Appeal, consisting of Baggallay, Bowen and Fry, L.JJ. Baggallay, L.J. said that he "had no hesitation in saying that the giving of such a guarantee did not fall within the ordinary scope of banking business."

The case for the plaintiff then was clearly very much stronger than that of the present plaintiff.

It frequently happens that shippers of goods require some guarantee that drafts for the purchase-price will be paid, and it would seem to be a most convenient course for banks to give such guarantees for its customers upon being furnished with funds to cover the drafts. As a matter of practice this is frequently done.

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The transaction in the present case is, however, absolutely unique. Although counsel for the respondent cited on the argument some 60 odd cases, he could find no case which even by analogy bore the slightest resemblance to the case at bar. Moreover, no case was cited which in any way supported the position that a banking corporation has power to guarantee the repayment of a loan made by a third party to one of its customers.

On October 15, 1917, the Winnipeg Motor Company owed the bank over $20,000.

Plaintiff proposed to loan the company $10,000 for four months. For so doing she was to be paid a bonus of $1,000 and receive the bank's guarantee for repayment of the loan.

The local manager of the bank acquiesced in this arrangement, signed the guarantee and initialed the post-dated cheques. The head office of the bank knew nothing whatever about the transaction at the time it was entered into and only learned of it a few days before the cheque, payable November 15, was presented. Mr. Dalgleish, who acted as solicitor for the plaintiff in connection with the loan, was called by the plaintiff. On cross-examination he was asked if he did not think it an extraordinary transaction for a banking institution, which was operating a business, to agree to repay his client $11,000 for the loan of $10,000, and his reply was: "Not after it was explained to me."

Now the explanation which he says was made to him by the local manager was: "that they [the Winnipeg Motor Company] were heavily indebted to the bank, and that they could not exceed their line of credit."

One would have thought that such an explanation would have at once aroused his suspicions. If the manager had permitted the company to draw up to the line of credit fixed presumably by the head office what power had he to give the bank's guarantee to a third party who was advancing the company money at over 30-per-cent interest. Apart from this the extraordinary character of the transaction itself should have put the plaintiff on enquiry as to the powers of the bank to

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enter into it, and she has only herself to blame if in the result she loses her money.

The conclusion I have arrived at is that the bank had no power to give the guarantee sued on, and that therefore the plaintiff cannot recover.

It was urged on behalf of the plaintiff, that even if the bank had no power to give the guarantee, it had received the plaintiff's money and must repay it. The money was paid into the bank to the credit of the Winnipeg Motor Company's account and all chequed out within a few days. Under these circumstances I cannot see how the defendant can be said to have derived any benefit from the plaintiff's money.

I would allow the appeal and dismiss the action.

DENNISTOUN, J.A.—The facts in this case are set forth in the judgment of the learned trial Judge now appealed from. Many grounds are put forward by Mr. Pitblado counsel for the plaintiff (respondent) in his able argument in this case to maintain that judgment, among them the following:

(1) The bank is liable for acts of the manager within the scope of his actual or ostensible authority; (2) The initialing of the cheques by the manager constituted an acceptance by the bank; (3) Or at least a promise to accept and pay; (4) The bank is liable for the representations made by the manager, even if fraudulent and untrue; (5) Independently of the letter and initialing of the cheques as the bank had put Baxter and Martin in charge of the business the bank is liable for the amount of the loan; (6) Even if there were no authority in the manager there was a ratification on the part of the bank by keeping the money or retaining the benefit.

In my opinion the plaintiff can recover, if at all, only upon (1) or (6) of the grounds above stated.

Unless the local manager of the bank had authority, actual or ostensible, to do what he did in this case there can be no liability under (2), (3), (4), or (5) of those grounds.

From the facts as stated it appears that the manager of the local branch of the defendant bank at Winnipeg attempted to do one or more of the following things:

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(1) To borrow money on behalf of the bank; (2) To guarantee a loan of money from a third party to a customer of the bank; (3) To bind the bank to pay post-dated cheques of a customer at a future date without there being sufficient funds in hand or in prospect with which to make such payment.

The general powers of a bank in Canada are derived from sec. 76 of *The Bank Act*, R.S.C., ch. 29, [3 & 4 Geo. V., ch. 9], which is in part as follows:

76. The bank may—

(*d*) engage in and carry on such business generally as appertains to the business of banking.

The limits of a banker's business cannot be laid down as a matter of law. The nature of such business is a question of fact on which the jury are entitled to have regard to their own knowledge of business, and to the evidence in the particular case, and it is from that point of view that the present case must be considered. It cannot be treated as if it were a matter of pure law. [Lord Finlay, L.C. in *Banbury v. Bank of Montreal* [1918] A.C. 626, at p. 653, 87 L.J.K.B. 1158].

The trial Judge sitting in this case as a jury has found that "the manager acted beyond the scope of his authority, a position which the plaintiff must be held to have known." Mr. Pitblado argues that this finding is not applicable to the case as proved but is made in respect to a hypothetical case which the learned trial Judge first stated and then demolished. I cannot agree. In my opinion the trial Judge finally disposed of the question of "authority" before turning to the question of "benefit" upon which he based his judgment.

I can find no evidence that the bank had authority to do any of the acts which Paterson attempted to do as set forth above and there is ample evidence given by experienced bankers that in any event such acts were not within the ordinary scope of the authority of a branch manager of a bank. *In re Southport & West Lancashire Banking Co.*, 1 T.L.R. 204; *Falconbridge on Banking and Bills of Exchange*, p. 136.

Assuming that the bank had power to do these things, it has been argued that Paterson was the bank and could do what the bank could do. I cannot accept this argument. It is a matter of common knowledge that chartered banks in Canada of which the defendant bank is one, have numerous branches,

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scattered over a wide extent of country, and separated by long distances from their head offices. Many of these branch banks are in small towns, villages and hamlets and are in charge of young men of limited experience of banking and of general business.

The argument that all such managers have authority to exercise all the powers which pertain to the business of banking including power to pledge the credit of the bank without limit in my opinion needs no answer.

The Winnipeg branch of the Merchants Bank of Canada is a large branch doing business in a city of substantial size, but the rule which should be applied to all branch managers is the same, viz., their powers are such as are delegated to them actually or ostensibly by head office and the onus of proving what those delegated powers may be is upon the plaintiff.

The evidence of authority of the manager in this case is limited to proof that Paterson was duly appointed to that position in the Winnipeg branch of the bank, and it is argued that ostensibly he had all the powers which he attempted to use in this case.

Ostensible authority as applicable here may be stated to be authority which is naturally to be inferred by reasonable persons dealing with a branch bank manager of a city branch in the ordinary course of business. It has to do with the things such managers do from day to day which are known to their customers and to their head office as part of the usual practice of the banking business.

The transaction now under consideration is not only outside the category of ordinary business, but is of so unusual a character as to be startling in its features, and full of menace to banking institutions, putting it into the power of a branch bank manager, if validated, to involve his bank in unlimited liability without any knowledge, or means of knowledge, on the part of the directorate.

The onus of establishing the authority of an agent is upon the person who seeks to bind the principal. The plaintiff in this case not being able to show any specific authority is forced

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to rely upon the general or ostensible authority which attaches to the position of manager, but in my opinion something further is necessary: *Pole v. Leask*, 33 L.J. Ch. 155, 9 Jur. (N.S.) 829.

Ostensible authority may vary in respect to the class of person to whom such authority is apparent. In this case the authority as to which judicial inference is to be drawn has to do with negotiations between a bank manager and persons who by reason of their occupation and professional training are familiar not only with banking methods but with banking law as well. Mr. Stevens is an active grain merchant of Winnipeg, familiar with banking business; Mr. Dalgleish is a solicitor, and the authority of the local manager of the branch bank which was ostensible or apparent to them, is the measure by which in my opinion the responsibility of the bank should be determined.

They knew that the Winnipeg Motor Company was heavily indebted to the bank and that all parties concerned did not want to exceed openly the line of credit which had been granted to Baxter and Martin. They knew also that the method adopted of giving post-dated cheques initialed by the manager, accompanied by a letter undertaking payment by the bank, was most unusual in its terms, and was an indirect and concealed method of doing the very thing, on most usurious terms, that Baxter, Martin and the manager were unwilling to put forward to head office as a straight business proposal on ordinary banking terms.

Stevens admits in his evidence that he never knew of a banking transaction of this kind, and no evidence was given on behalf of the plaintiff to show that such a transaction had ever taken place previously, or that such a transaction could reasonably be contemplated as within the powers of a bank manager. In the absence of such evidence, how can the Court infer that the transaction in question comes within the ordinary scope of banking business or within the powers of a bank manager? Even if the lender, Stevens, did rely upon the assurance of the manager that Baxter and Martin were running the Winnipeg Motor Company as representatives of and for

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the benefit of the bank there is no evidence that he or his solicitor was justified in assuming that the bank manager had authority to pledge the credit of the bank to post-dated cheques spread over four months time to the amount of $10,000 and to pay $1,000 by way of bonus for the use of the money. In such a case the bank would have been the borrower itself and any person with a knowledge of banking customs and practices should have been put upon his guard.

The office of the western superintendent of the bank was in the same building as the Winnipeg branch office and all that Stevens or Dalgleish had to do was to refer the matter for confirmation to the superintendent before closing the transaction. They no doubt realized that if they adopted such a course the bank would immediately repudiate the transaction and they relied on Paterson retaining his position long enough to fulfil his promises which he certainly would have done rather than risk exposure of the scheme.

It was a case of an anxious manager seeking by extraordinary means to infuse a show of life into a bad account without the knowledge of his head office of the methods adopted, and Stevens and Dalgleish, as capable business men, must have realized the true position, and the chances they were taking with the plaintiff's money. The sudden removal of Paterson from his position before the first cheque became payable and the disclosure by Dalgleish of what had taken place caused an immediate repudiation to be sent by the bank to the plaintiff. As the trial Judge states, "the inevitable followed" and, in my opinion, the bank cannot be charged with the loss which has occurred.

It is generally recognized by banking authorities that a local manager has no authority to borrow money on behalf of the bank.

When banks borrow money they do so by means of their note circulation, their customers' deposits, and by the sale of drafts, letters of credit, etc., to be repaid by them at another place and at a future time. That is the general practice of bankers. *Falconbridge on Banking and Bills of Exchange,* p. 136.

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Nor does there appear to be any express or implied authority for a branch manager to guarantee a loan by a third party to the bank's customer even at current rates of interest. In the present case an attempt was made to make a bank, which was probably lending money at not more than seven per cent per annum, responsible for money borrowed at 40 per cent per annum. If the manager had authority to do this where is the limit to be drawn?

Counsel for the respondent argues that Baxter and Martin took over this Winnipeg Motor Company business for the benefit of the bank and that the bank was carrying on the business through the agency of its own appointees under direction of the bank manager. The documents filed as exhibits do not show this to be the case. Ex. 17 is the agreement between Nellie Robinson and W. A. Robinson, vendors, of the one part, and Baxter and Martin, purchasers, of the other part. The bank was not a party to it and there is nothing in the document to indicate that this was other than a sale of a business as a going concern, the purchasers covenanting to assume and pay the trade liabilities of the vendors which included the debt to the bank. The purchasers, Baxter and Martin, became the owners of the business. The bank held no liens or hypothecations upon any portion of its assets, and could exercise no control over Baxter and Martin except as creditors for a large sum of money and as financial agents to whom Baxter and Martin were looking for further advances in the ordinary course of business.

The authorities show that a bank may for certain purposes and under certain circumstances, carry on a business which has devolved upon it and give warranties or undertakings in connection therewith notwithstanding the prohibitions contained in sec. 76 of *The Bank Act,* but such appear to be confined to matters in which the bank is interested directly as the holder of goods, debentures, or other assets which are being liquidated on behalf of the bank and not for third parties: *Ontario Bank v. McAllister,* 43 S.C.R. 338; *In re West of England Bank, Ex parte Booker,* 14 Ch. D. 317, 49 L.J. Ch. 400; *In re Southport and West Lancashire Banking Co.*

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(1885) 1 T.L.R. 204; *Dobell v. Ontario Bank*, 3 O.R. 299; 9 O.A.R. 484; *Simpson v. Dolan*, 16 O.L.R. 459. The plaintiff is not helped by these authorities as the facts clearly distinguish the present case from those now cited. The undertakings and representations given and made by Paterson were not for the purpose of realizing upon assets held by the bank, but for the purpose of securing a loan in which the bank had no direct interest and from which no benefit to the bank resulted.

The loan from Stevens was made to Baxter and Martin—not to the bank. It was secured by a promissory note and five post-dated cheques all payable to Hattie Stevens and signed by Baxter and Martin for the Winnipeg Motor Company.

In Paterson's letter of October 15, 1917, to Mrs. Stevens he refers to "the loan of $10,000 which we understand you are granting to The Winnipeg Motor Company," and he placed the money at the credit of the Winnipeg Motor Company and permitted it to be chequed out in reduction of their current liabilities. It is clear that the loan was not made to the bank or for the benefit of the bank but to Baxter and Martin for use in their business and not otherwise.

There can be no doubt but that Paterson was deeply interested in the transaction. He knew that an improvement in the affairs of the motor company would eventually improve the position of the bank, but I cannot find evidence that Baxter and Martin secured this loan as representatives of the bank so as to bind the bank by the terms arranged at the time of its negotiation.

Reference has been made upon the argument to cases on Canadian banking law in the province of Quebec, and the following cases were dealt with: *Exchange Bank v. Banque du Peuple, Montreal*, L.R. 3 Q.B. 232; *City Bank v. Bank of Montreal*, 17 Lower Can. Jur. 197; and *Molsons Bank v. Kennedy*, 10 Revue Legal 110. These cases indicate certain acts of bank officials which were shown by evidence to be governed by local custom and ostensible authority and held to bind the bank; but there is nothing in any of them which bears directly on the facts involved in this case. The principles upon which they were decided are undisputed.

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Having arrived at the conclusion that the bank manager had no authority, real or ostensible, to enter into this transaction so as to bind his bank, there remains but the other point referred to, which, in my opinion, is material to this case, and it was on this latter point that the judgment at the trial was based.

Did the bank get the benefit of the transaction and has it retained the plaintiff's money?

The sum of $10,000 loaned by Mrs. Stevens to Baxter and Martin was deposited by Paterson, the bank manager, to the credit of the Winnipeg Motor Company on October 15, 1917. This deposit increased the amount at the credit of current account from $5,405.71 to $15,405.71. On the same day the liability ledger of the bank showed the Winnipeg Motor Company indebted in the sum of $21,460 for loans and $15,818 for trade bills, a total of $37,278.

Had the manager appropriated the balance at the credit of current account and transferred it to the liability ledger in reduction of the indebtedness there shown, the plaintiff's case might have been made out, but he did not do so. On the contrary, he permitted Baxter and Martin to cheque out the whole sum in payment of current liabilities of the Winnipeg Motor Company during October 16 and 17, leaving the indebtedness to the bank untouched. If the bank had received the money and applied it in reduction of the debt of Baxter and Martin, it would have adopted the loan and so be liable: *Jacobs v. Morris* [1902] 1 Ch. 816, at p. 832, 71 L.J. Ch. 363.

It is argued that among the debts so paid was one of $7,500 to C. C. Fields upon which the bank itself was liable by reason of the fact that Paterson had initialed a post-dated cheque held by Fields in the same way that he subsequently initialed the cheques in question for Mrs. Stevens, but this is an argument in a circle. If the bank be not liable on the Stevens cheques neither was it on Fields, and in the view now taken it is not liable on any of them. There was also a cheque for $800 payable to the order of the Merchants Bank, which the evidence shows went to the personal credit of Baxter. In neither of these cases as appears from the evidence did the bank receive

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any benefit from the plaintiff's money, it was applied direct to the current liabilities of the Winnipeg Motor Company, apart altogether from the liability to the bank. The balance of the $10,000 went to pay ordinary trade liabilities of the Winnipeg Motor Company.

The head office of the bank had no knowledge of the matter until it was too late to take action, and the plaintiff's money had passed beyond the bank's control.

Such cases as *Barwick v. English Joint Stock Bank* (1867) L.R. 2 Ex. 259; *Adams v. Craig,* 24 O.L.R. 490, 2 O.W.N. 857; *Richards v. Bank of Nova Scotia,* 26 S.C.R. 381, at p. 385; *Simpson v. Dolan, supra,* and numerous other cases of a similar character relied on by the respondent do not turn upon the question of authority but upon the ground that the bank having received the benefit of the transaction could not repudiate and retain the benefit. There can be no doubt as to this being the law, but it does not apply to this case.

A perusal of the numerous cases cited by counsel has been a task of no little labour. It leaves the firm conviction that the manager had no authority, real or apparent, for what he did, and that the finding of the learned trial Judge on that ground should not be disturbed. Upon the other point that the bank received the benefit of the transaction and should repay to the plaintiff the sum of $10,000, with great respect, I am unable to agree, as I can find no evidence to support it.

The principles of law in reference to representation, undertaking, *ultra vires,* acceptance, ratification, adoption and repudiation so ably dealt with in the argument have not been dealt with by me as, in my opinion, the case for the plaintiff collapses when the conclusion is reached that the accredited agents of the plaintiff knew that the bank manager had no authority to act as he did, that they appreciated the risk they were running and took the chances with their eyes open.

In my judgment the appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed with costs.

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COURT OF APPEAL

CANADIAN NORTHERN RAILWAY

v. RURAL MUNICIPALITY OF SPRINGFIELD

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Taxation—Sale of Taxes—Some of the Taxes Not Properly Imposed—Sale Invalid.

A tax sale is invalid for every purpose unless the property was at the time liable for all the taxes for which it was sold. This rule is available to an owner under the wording of sec. 199 of *The Assessment Act*, R.S.M., 1913, ch. 134. Where land was sold for taxes for the years 1910 and 1911 and the taxes were properly imposed for 1910 but not for 1911 the sale was invalid.

Judgment of Macdonald, J. ([1919] 1 W.W.R. 709) reversed.

ARGUED: 15th October, 1919.

DECIDED: 1st December, 1919.

Statement. Appeal by plaintiff from a judgment by Macdonald, J. ([1919] 1 W.W.R. 709) in an action brought to recover moneys paid under protest for taxes and costs. Appeal allowed.

O. H. Clark, K.C., for plaintiff, appellant.

H. M. Hannesson, for defendant, respondent.

The judgment of the Court was delivered by

CAMERON, J.A.—This action is brought to recover the sum of $494.68 made up of $184.80 taxes for 1910, and percentages; $174.73, taxes for 1911, with percentages, and $135.15, costs of tax application in respect of certain lands, paid to the defendant municipality by the plaintiff company under protest to prevent the issue of a certificate of title. A case was stated for the opinion of the Court and the facts appear in the judgment of Mr. Justice Macdonald ([1919] 1 W.W.R. 709). The lands were sold for taxes for the years 1910 and 1911, on November 1, 1912. For the former year the taxes were admitted to have been properly imposed and the defendant municipality paid into Court the sum of $192.35, being the taxes for 1911, and percentages and interest, but denied liability for the $135.15, costs of application. Mr. Justice Macdonald gave the plaintiff company judgment for the $192.35 and costs up to the date of the payment into Court but awarded the defendant municipality the costs subsequent thereto. The plaintiff com-

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pany appeals from this judgment on the ground that it was entitled to repayment of the costs of application. It is contended that the sale was invalid *in toto* and reliance was placed on the wording of sec. 199 of *The Assessment Act*, R.S.M., 1913, ch. 134.

Sec. 199 is as follows:

199. Upon the expiration of two years from the day of sale, and thereafter unless and until the land is redeemed, the tax purchaser or his assigns shall, in all suits or proceedings wherein such tax sale is questioned, be *prima facie* deemed to be the owner of the land.

(2) Upon the expiration of said period of two years the treasurer's return to the district registrar hereinafter provided for shall in any proceedings in any court in this Province, and for the purpose of proving title under *The Real Property Act*, be, except as hereinafter provided, conclusive evidence of the validity of the assessment of the land, the levy of the rate, the sale of the land for taxes and all other proceedings leading up to such sale and that the land was not redeemed at the end of said period of two years; and, notwithstanding any defect in such assessment, levy, sale or other proceedings, no such tax sale shall be annulled or set aside except upon the following grounds and no other; that the sale was not conducted in a fair and open manner, or that the taxes for the year or years for which the land was sold had been paid, or that the land was not liable to taxation for the year or years for which it was sold.

In the Revised Statutes of 1892, sec. 191, ch. 101, the words setting forth the grounds on which, and no other, a tax sale could be set aside were these:

That the sale has not been conducted in a fair, open and proper manner: or that there were no taxes due and in arrears upon such land at the time of said sale for which the same could be sold.

The issue of tax-sale deeds by municipalities was abolished and a new method of making title to land sold at tax sales by application to the district registrar was instituted in 1894 by sec. 5, ch. 21, 57 Vict. The district registrar was authorized and bound to proceed in the manner therein prescribed, and issue a certificate of title unless it was shown to his satisfaction that the land was not liable for "the taxes or any portion of the taxes for which the same was sold." This last-mentioned section was repealed by sec. 1 of ch. 21, 60 Vict. (1897) and a new set of sections substituted. By subsec. (9) of said sec. 1, the district registrar was bound to issue a certificate unless it was shown to him that the land was not liable for "any portion of the taxes for which the same was sold." This

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latest-mentioned section was in its turn repealed by sec. 12, ch. 35, 63-64 Vict. (1900) and another series of subsections substituted, and in subsec. (16) there are set out the only grounds upon which a tax sale can be annulled or set aside in these words:

> That the sale was not conducted in a fair and open manner, or that the taxes for the year or years for which the land was sold had been paid or that the land was not liable for taxation for the year or years for which it was sold.

These words were carried into the 1902 revision, ch. 117, sec. 202, and appear in the revision of 1913, sec. 199, ch. 134, as above quoted. It appears, therefore, that the words of sec. 199 on which the solution of the question before us depends have been on the statute book since 1900 only. Decisions of our Courts on the validity of tax-sale proceedings prior to that time have, therefore, little application. Apparently if the legislation, above referred to, enacted in 1894 or in 1897, had remained in force, there could have been no question as to the validity of the sale before us. But the wording of sec. 199 is different, and no doubt designedly so, and it is now open to an owner to impeach a tax sale on the ground that the land was not liable to taxation during the year or years for which it was sold. The land in this case was sold for taxes for the years 1910 and 1911, and it was not liable to taxation for those years, but only for one of them.

Sec. 152 of ch. 134, R.S.M., 1913, provides that

> whenever the whole or any portion of any tax on any land has been due and unpaid for more than one year, after the thirty-first day of December of the year in which the rate was struck, such land shall be liable to be sold for arrears of taxes unpaid thereon up to the time of the making up of the list for sale, and the costs of advertising.

This provision is clear. The right to sell arises as soon as any taxes, or the taxes for any year, are unpaid for more than a year, and thereupon the municipality has the right to sell for the whole amount of the taxes in arrears at the time the list is made up. It is on the basis of this aggregate amount that the treasurer offers the lands for sale (sec. 165) and the treasurer is authorized to give his certificate, in the form given in sec. 175, that he has sold the land "for arrears of taxes and costs." The owner of the land is given the right of redemption at any

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time within two years by paying or tendering to the treasurer "the amount of arrears and costs, for which the same was advertised and sold," together with the prescribed percentages.

It is clear, therefore, that lands are made liable to be sold for all taxes in arrear at the time of preparing the lists, provided that some portion of them is in arrear for more than one year. After the list is made up the municipality deals with all the arrears as one amount, and they are the foundation of the sale proceedings and of the title to the purchaser. It is impossible to find any suggestion that the municipality may offer for sale or sell lands for an amount which includes a sum in excess of that lawfully due. If that be so, and I see no escape from the conclusion, it seems to me that the general rule applies that, "if land is sold for taxes, a part of which are legal and a part illegal, the sale is void *in toto*." (*Black on Tax Titles,* par. 230, and the cases there cited).

The decisions generally recognize the following fundamental rules: That a tax-sale is invalid for every purpose unless the property was at the time liable for all the taxes for which it was sold. [37 *Cyc.* 1287].

This door of relief, closed by previous legislation, is now thrown open to the owner. I think the words in sec. 199, "for the years for which it was sold," mean, "For all the years for which it was sold," and that as the land was not liable for taxation for both the years for which it was sold, the sale was for all purposes invalid.

There were some other matters discussed on the argument, such as the failure of the company to make the prescribed return of this land to the treasurer, but, in my opinion, they have no real bearing on the question before us. I would answer the question in the case as follows: "Plaintiff is entitled to recover the whole amount paid to redeem, less the 1910 taxes and percentages."

I would allow the appeal and enter judgment accordingly. The plaintiff company must have the costs of action as well subsequent as prior to the payment into Court, and the costs of this appeal.

Appeal allowed with costs.

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COURT OF APPEAL

REX v. NOVAK ET AL

Before PERDUE, C.J.M., CAMERON, HAGGART and DENNISTOUN, JJ.A.

I. Contract. II. Guarantee—Crown.

I. Contract—Contract with Crown—Assumption that Crown Will Deal Justly—Guarantors of Infant's Contract—Construction—Direct and Not Collateral Promise—Estoppel from Objecting to Absence of Mutuality—Method of Payment Impossible through Default—Enforcement of Payment.

A student under 21 years of age contracted with the Crown to be supplied with certain necessaries for the purpose of taking a course to qualify himself as a teacher and for the recovery of payment out of his salary after receiving his certificate or permit to teach. If he failed to teach for three years or refused to teach in the school selected by the Minister of the Crown payment of the amount due under the agreement was to be made. The defendant guarantors joined in the agreement for the purpose of binding themselves jointly and severally with the student to the Minister and covenanted to hold themselves personally liable for the repayment of all moneys due to the Minister under the agreement. The student left the school before becoming qualified to teach.

Held, although if the contract had been one of apprenticeship to a commercial firm or relating to education by an institution looking for a profit the Court might have considered the terms of the contract as not sufficiently defining or assuring the student's rights and placing him too much in the hands of the other party, yet it must be assumed that the Crown would deal justly and the contract was therefore reasonable and generous.

The defendant guarantors' covenant was an original undertaking and not one of suretyship.

The Crown having adopted and ratified the contract and supplied the infant with necessaries the defendants were estopped from objecting that the contract did not bind the Crown.

The obtaining of a certificate and method of payment provided having become impossible through the student's default, although the agreement did not specifically provide for such contingency, the debt must be paid unconditionally and the guarantors were liable therefor.

II. Guarantee—Crown—Laches.

The Crown cannot be guilty of laches and thereby permit a surety to be discharged.

ARGUED: 26th November, 1919.
DECIDED: 12th December, 1919.

Statement. Appeal by plaintiff from County Court judgment in favour of defendant in an action to enforce payment under a contract. Appeal allowed.

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H. J. Symington, K.C. and *E. D. Honeyman,* for plaintiff, appellant.

W. H. Trueman, K.C., for defendant, respondent, Novak

The judgment of the Court was delivered by

DENNISTOUN, J.A.—This action was tried in the County Court of Winnipeg. Evidence was given on behalf of the plaintiff. The defendant declined to adduce evidence and a judgment of nonsuit was entered.

The plaintiff appeals.

Mr. Trueman for the respondent argues that the contract is too obscure, too improvident, and too unreasonable for enforcement, that the infant placed himself unreservedly in the hands of the Crown and that his rights are so indistinctly defined as to leave him at the mercy of the department of education without any assurance that he will ever receive a certificate, or a permit, or a school to teach in.

Had the contract been one of apprenticeship to a commercial firm or even one relating to education by an institution looking for a profit, the Court might well have adopted such a view: *De Francesco v. Barnum* (No. 2) 45 Ch. D. 430, 63 L.T. 438. But it must be assumed that the Crown, acting by a responsible minister, will deal fairly and justly by a young student of foreign nationality, its only object being to provide qualified teachers for the public schools of the province and with special reference to the non-English-speaking communities. Looked at from this point of view, the contract is both reasonable and even generous in its terms and one which the guardians of an infant might well be advised by this Court to execute on his behalf.

The student attended the school as provided by the contract from about December 6, 1911, until June, 1913, when he ran away and has not been heard of since. He obtained no certificate or permit and never became qualified to teach in a public school. The sum claimed in this action is $291 for board, lodging, books, paper, and other materials of whatsoever kind or nature (clothing and wearing apparel excepted) necessary for his health, comfort, support, maintenance, and education.

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being at the rate of $200 per annum. That is a very reasonable sum for the services rendered by the Crown.

The agreement states that the student was a minor when the contract was entered into and it is evident that the Minister was not satisfied to rely upon the covenant of an infant, even for necessaries nor upon the probability of recovering from his salary as a teacher after he left the school as provided by the agreement. He required and obtained an absolute covenant and an original undertaking to pay from the defendants Novak and Demczuk, which is set forth in par. 9 of the agreement as follows:

> 9. And whereas the said party of the second part [the student] is a minor within the age of twenty-one years, and the above-named parties of the third part [guarantors] being the warrantors and natural guardians of the said party of the second part, they the said parties of the third part join in this agreement for the purpose of binding themselves jointly and severally with the said party of the second part to the said Minister and hereby covenant with the said Minister that they will hold themselves personally liable for the repayment of all moneys due to the said Minister for the support, maintenance and education of the said party of the second part under the terms and conditions of this agreement.

In *Harris v. Huntbach,* 1 Burr. 373, Mr. Justice Foster, discussing the liability of guarantors for a person under disability, says:

> The infant was not liable, and therefore it could not be a collateral undertaking. It was an original undertaking of the defendant, to pay the money.

In the case under consideration, it is contended that the contract is for necessaries supplied to an infant upon which he may be personally liable and that the undertaking of the other defendants is a collateral promise only. In my opinion the covenant relied on is a direct promise, an original undertaking, and not one of suretyship, but in any event I do not think it makes any difference in this case whether Novak and Demczuk are principals or sureties, as the Crown cannot be guilty of laches and thereby permit a surety to be discharged. *Black v. Reg.* 29 S.C.R. 693; *De Colyar's Law of Guarantees,* 3rd ed., p. 446; 15 *Halsbury's Laws of England,* 560. The defences pleaded on such grounds cannot avail.

It is further argued by Mr. Trueman that there is an absence of mutuality; that the contract is not binding upon the

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Crown, and that such a liability must be established before it can be held that the defendants are liable on their part. The answer is that the Crown adopted and ratified the contract entered into by the Minister and supplied the infant with necessaries for a year and a half. The contract has been fully performed so far as the Crown is concerned, and the defendants are estopped from taking this position. *Secretary of State for India v. Kamachee Boye Sahaba,* 13 Moore P.C. 22, 7 Moore Ind. App. 477; *Buron v. Denham,* 2 Ex. 166 (154 E.R. 450).

Respondent further alleges that bi-lingual schools having been abolished by statute in 1916, there was a total failure of consideration, as it was contemplated by the agreement that the infant was to become a teacher in a bi-lingual school before any liability attached to him or his guarantors. Although bi-lingual schools are referred to in one of the recitals of the contract, a perusal of the whole document makes it clear that the object was to qualify the student as a teacher in the public schools of the province and not otherwise. Through his own default this became impossible. Moreover, bi-lingual schools were not abolished until 1916, three years after the student absconded. This argument may therefore be eliminated.

The covenant for payment on the part of the student provides for recovery of the amount of the debt from his salary as a teacher in a school selected by the Minister after having received a certificate or permit to teach. In the event of his failing to act as a teacher for three years, or refusing to teach in the school selected, payment of the amount due under the agreement is to be made.

The agreement does not specifically provide for the contingency which has happened whereby the student by his own act and default has made it impossible for him to obtain a certificate or permit or a salary or a school to teach in.

He cannot set up his own breach of faith as an answer to the plaintiff's claim. To do so would be fraudulent. Having put it out of his power to pay the debt in the manner contemplated he must pay it unconditionally for the debt must be discharged. It is due and owing to the Crown.

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Nor are the sureties or guarantors—and I use these terms as synonymous under English authority—though a distinction is drawn between them in some of the Courts of the United States—in a better position.

The covenant which they have signed is absolute as set forth above. They bind themselves for the repayment of all moneys due to the said Minister for the support, maintenance and education of the said party of the second part under the terms and conditions of this agreement.

The existence of the debt has been established, the method of payment by the student has become impossible through his default, and the covenant of the other defendants on the strength of which these necessaries were supplied must now be resorted to and enforced: *Handcock v. Hodgson,* 4 Bing. 269, 12 Moore 504; *McIntyre v. Belcher,* 14 C.B. (N.S.) 654, 32 L.J.C.P. 254.

I would allow the appeal and set aside the nonsuit entered in the County Court. There should be judgment for the Crown for the amount claimed against all defendants with costs here and below, if demanded.

Appeal allowed with costs.

COURT OF APPEAL.

Before PERDUE, C.J.M., HAGGART and DENNISTOUN, JJ.A.

SCOTT v. MONTGOMERY

Construction of Term of Contract—"Net Proceeds."

Plaintiff and defendant entered into an agreement to purchase certain land. Subsequently defendant took an assignment of plaintiff's interest therein and agreed that after making a sale of the land he would pay to plaintiff one half the "net proceeds" received from time to time from the sale, until he had paid the plaintiff $2,000.

Held the "net proceeds" did not mean "net profits" and defendant was not entitled in estimating the net proceeds to deduct any moneys paid on the land prior to his taking the assignment from the plaintiff.

ARGUED: 19th November, 1919.

DECIDED: 12th December, 1919.

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Statement.

Appeal by defendant from a judgment in an action for interest, alleged to be due under the terms of an agreement. Appeal dismissed with costs.

H. A. Bergman, for defendant, appellant.

A. E. Hoskin, K.C., for plaintiff, respondent.

PERDUE, C.J.M.—The plaintiff sues for $140, being interest on the sum of $2,000, which he claims to be due to him from the defendant under the terms of an agreement dated May 17, 1915. The plaintiff and the defendant had entered into an agreement in writing dated May 31, 1912, by which they agreed to purchase from one Dowdall a section of land in Manitoba for the sum of $13,280, payable partly in cash and the balance in five equal annual payments with interest at six per cent. The plaintiff paid $2,800 on account of purchase-money and taxes. He enlisted for overseas service on May 12, 1915. He was then unable to pay his share of the remaining payments on the land and the defendant agreed to purchase his interest in it. Accordingly the plaintiff gave a quit-claim deed and an assignment to the defendant by which he granted, and assigned, to the defendant all his estate, right, title and interest in the land and in the agreement to purchase it. The parties at the same time entered into the agreement of May 17, 1915. This agreement recites the purchase of the land from Dowdall and the giving of the quit-claim deed. The third recital is as follows:

> And whereas in consideration of the said quit claim deed and assignment it has been agreed that the said party of the first part [the defendant] shall pay to the party of the second part [the plaintiff] the sum of two thousand dollars on the days and times hereinafter mentioned.

By the first clause of the operative part of the agreement the defendant agreed to pay the plaintiff

> one half of all the net proceeds received from time to time by the party of the first part from the sale of the said lands after the sale of the said lands shall be made by the party of the first part until there shall have been paid by the party of the first part to the party of the second part the sum of two thousand dollars, and it is agreed that any part of such moneys which shall be paid within three years from this date shall not bear interest but interest shall be paid on any part of said two thousand dollars paid after the expiration of three years from this date, such interest to be computed from May 17th, A.D. 1918, and at the rate of six per cent per annum.

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PERDUE, C.J.M.

By the second clause there shall be no obligation on the part of the defendant to sell the land until he shall have received an offer satisfactory to him.

By the last clause it is agreed that the plaintiff has no right, title, or interest in the land,

> but relies solely upon the covenant of the party of the first part to pay to him the party of the second part the said sum of two thousand dollars without or with interest, as herein before set forth.

The defendant has sold the land for $14,080 and has received the purchase-money in full. The plaintiff brought this action in the County Court of Winnipeg to recover $140 being interest on $2,000 from May 17, 1918, under the provisions of the first clause of the agreement. The defence is that the defendant sold the land for the best market-price that he could obtain and he puts in an account showing the amount paid out by him for purchase-money and taxes and claiming interest upon all moneys so disbursed. After giving credit for the purchase-money the defendant alleges there was a deficiency of $668 and that no "net proceeds" were realized.

The defendant claims that the expression "net proceeds" means the same as "net profits." In support of this contention the following American cases were cited: *Maloney v. Love,* 52 Pac. R. 1029; *Hall v. Abraham,* 75 Pac. R. 862; *Williams v. Walsh,* 135 N.W.R. 954. In *Maloney v. Love, supra,* a decision of the Court of Appeals of Colorado, it was held that the expression,

> net proceeds, as used in a contract, where their signification is not qualified or restricted by other words in the same contract, means what remains of the gross proceeds after all expenses and loss incurred in realizing them are deducted.

But the judgment goes on to show that this could not be the meaning in the particular contract there under consideration, and therefore the true intention should be gathered from the rest of the document. In *Hall v. Abraham, supra,* it was held that "net profits" may be synonymous with "net proceeds," "in the light in which the latter is employed in the agreement under consideration." In *Williams v. Walsh, supra,* the expression "net proceeds" as used in the agreement there under consideration was held to be equivalent to "net

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profits." In all of these cases the meaning of the expression was gathered from the context of the document in which it was found.

Another authority cited was *Caine v. Horsfall,* 1 Ex. 519, 17 L.J. Ex. 25. In that case the following letter was addressed to a captain and supercargo by his employers:

> Your commissions are £6 per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz., £4 per ton from the gross sales of the oil when taken from the quay, and 4l. 15s. when warehoused.

It was held that the commission was payable only on the sums actually realized, after deducting bad debts as well as other charges. Pollock, C.B., said that "net proceeds," in mercantile language, meant the sum actually received after making all deductions. The Court held that not only were the usual charges to be deducted from the gross sales but also the bad debts in order to arrive at the net proceeds.

In the present case the whole purchase-money of the land has been received by the defendant and the net proceeds will be the sum left after he has deducted the moneys properly paid out. He seeks to take into account all sums of money paid out by him in connection with the purchase of the land and the payment of taxes upon it and to charge interest on such sums although some of them were paid prior to the agreement of May 17, 1915. When the last-mentioned agreement was made the plaintiff and defendant were joint owners of the land. The transaction evidenced by the agreement was a purchase by the defendant of the estate and interest of the plaintiff in the land. The net proceeds of the sale of the land by the defendant would be the sum that remained after deducting from the money received from the sale of the land all sums properly paid out by the defendant after the date of the agreement. These sums would include the moneys due under the agreement of May 31, 1912, and taxes accruing after May 17, 1915. The defendant cannot go behind the last-mentioned date and charge against the proceeds of the sale moneys paid by him during the joint ownership. We are not dealing with his profit or loss in respect of the whole transaction from the time he entered into the first agreement. He was to pay the

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plaintiff one-half of the net proceeds received from the sale until the plaintiff should have received $2,000. When the agreement of May 17, 1915, was executed the plaintiff also executed and delivered to the defendant a quit-claim deed of the land and an assignment of the original agreement of purchase of May 31, 1912. In this assignment it was stated that the amount then owing and unpaid under the last-mentioned agreement was $6,480 with interest at six per cent since May 31, 1914. The tax receipts put in showed that the taxes had been paid up to December 31, 1914. The taxes from and including the year 1915, and the balance of the purchase-money would be payable by the defendant. His account shows that he paid $7,560, being the balance of purchase-money and interest, and $628.08 taxes for the years 1915-1918, making together the sum of $8,188.08. Allowing interest on the taxes the net proceeds would, from defendant's own figures, appear to be about $5,800.

By the agreement the defendant covenanted to pay the plaintiff one-half of the net proceeds received from time to time from the sale of the lands, until there should be paid to the plaintiff the sum of $2,000. Now if the parties meant *net profits* when they used the words *net proceeds* how could these net profits be ascertained from time to time as they were received from the sale of the land? The net profits could not be ascertained until the whole purchase-money was received. The purchaser might fail in making his payments and the land might have to be resold at a loss. But *net proceeds*, being the amounts actually received, after making all deductions, are ascertainable from time to time. From the agreement and the evidence it appears that the sum of $2,000 was payable by the defendant to the plaintiff since May 17, 1918, and interest on that sum at six per cent per annum was overdue when this action was begun. I think the judgment in the County Court should be affirmed with costs.

HAGGART, J.A. concurs.

DENNISTOUN, J.A.—In 1912, the plaintiff and the defendant jointly purchased a parcel of land for $13,280, payable by instalments. On May 17, 1915, the plaintiff, who had paid

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some $2,700 on account of his share of the purchase-money, represented to the defendant that he was leaving on overseas military service and was unable to make further payments on account of the purchase. A new agreement in writing was then entered into in accordance with which the plaintiff gave to the defendant a quit-claim deed of the land and an assignment of his rights under the sale agreement. Both parties executed this new agreement under seal. After reciting the terms of the agreement to purchase, it continues as follows:

And whereas the party of the second part [plaintiff] being unable to pay his portion of the purchase price of the said lands payable under the said agreement has by a quit claim deed and assignment bearing even date herewith granted, assigned, transferred, and set over unto the party of the first part [defendant] his executors, administrators and assigns all the estate, right, title and interest of him, the party of the second part under and by virtue of the said agreement and in and to the said lands and premises.

And whereas in consideration of the said quit claim deed and assignment it has been agreed that the said party of the first part shall pay to the party of the second part the sum of two thousand dollars on the days and times hereinafter mentioned;

Now therefore this indenture witnesseth that in consideration of the premises, the party of the first part doth hereby for himself, his executors, administrators and assigns, covenant and agree to pay to the party of the second part, his executors, administrators, or assigns, *one half of all the net proceeds received from time to time by the party of the first part from the sale of the said lands,* after the sale of said lands shall be made by the party of the first part until there shall have been paid by the party of the first part to the party of the second part the sum of two thousand dollars, and it is agreed that any part of such moneys which shall be paid within three years from this date shall not bear interest, but interest shall be paid on any part of said two thousand dollars paid after the expiration of three years from this date, such interest to be computed from May 17th, A.D. 1918, and at the rate of six per cent per annum.

And it is agreed that there shall be no obligation on the party of the first part to sell the lands until he shall have received an offer of purchase for said lands on such terms of purchase and interest as shall be in all respects satisfactory to the party of the first part, his executors, administrators and assigns.

And it is further agreed between the parties hereto that the party of the second part has now no estate, right, title, or interest in the said lands of any nature or kind whatsoever but relies solely upon the covenant of the party of the first part to pay to him, the party of the second part, the said sum of two thousand dollars without or with interest as hereinbefore set forth.

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On April 5, 1918, the defendant Montgomery sold the lands referred to for $14,080, and it is admitted that he has received the purchase-money.

When interest, taxes, and other outgoings are taken into consideration, it appears that the lands were sold by Montgomery at a loss to him of $668.

Scott brings this action in the County Court of Winnipeg for interest only and judgment has been given in his favour for $140 and costs.

Montgomery defends and appeals on the ground that the property having been sold at a loss there were no "net proceeds" out of which to pay the $2,000 which he covenanted to pay the plaintiff and for that reason there is not and never will be either principal or interest payable to the plaintiff.

He contends that "net proceeds" is equivalent to, and synonymous with "net profits" and he refers in support of this contention to *Canadian Port Huron Co. v. Fairchild,* 3 Sask. L.R. 228, 14 W.L.R. 525; *Caine v. Horsfall,* 1 Ex. 519, 17 L.J. Ex. 25; *Maloney v. Love,* 52 Pac. R. 1029; *Hall v. Abraham,* 75 Pac. R. 862; *Williams v. Walsh,* 135 N.W. 954; *Moore v. Donough* [1919] 2 W.W.R. 680; *Finkbeiner v. Yeo,* 26 Man. R. 22, 9 W.W.R. 891, 33 W.L.R. 195.

I am of opinion that the meaning of the words "net proceeds" must be determined after perusal and consideration of the whole document and reach the conclusion that they do not mean "net profits" in this case.

The case of *Canadian Port Huron Co. v. Fairchild, supra,* cited by the defendant, does not support his contention. In that case there was a resale of repossessed machinery. When the parties agreed that the "net proceeds" of such sale should be credited to the original purchaser there was no thought of profits. The parties were trying to minimize a loss, by crediting the proceeds of the resale after deducting the necessary outgoings in connection with that sale.

If a testator should devise lands to trustees for sale the "net proceeds" to be applied as directed, the question of profit would not arise at all.

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In the present case the parties agreed that Scott, who had invested $2,800 in the property, should recover $2,000 when the land was sold and paid for. His loss was fixed at $800. The profits, if any, were all to belong to Montgomery, who had the right to postpone the sale until he received a price satisfactory to himself. He chose to sell at a loss and has received all the proceeds of the sale. He may deduct from the proceeds of the sale which come to his hands, all the expenses and outgoings connected with that sale, and all sums which it was necessary to pay in order to give title to the purchaser. The balance remaining represents the "net proceeds" of the sale which are to be applied from time to time, one-half to each of the parties until the plaintiff has received $2,000 and interest. The remainder of the money belongs to the defendant and whether eventually he makes a profit or sustains a loss, makes no difference so far as the plaintiff is concerned.

The defendant's covenant as recapitulated in the last clause of the agreement to pay $2,000 is absolute. He may postpone payment until he makes a sale satisfactory to him, but not for an unreasonable length of time: *Granger v. Brydon-Jack,* 58 S.C.R. 491, at p. 500, [1919] 2 W.W.R. 621; *Hancock v. Hodgson,* 4 Bing. 269, 12 Moore 504.

I think the words "from time to time" are illuminating and important. They clearly indicate that payments are to be made as the money comes in by instalments. There is no suggestion that there is to be a final casting up of profits or losses before the proceeds of the sale are available for division.

The net proceeds of the sale exceed the sum of $4,000. The defendant has received the whole of the purchase-money and under the terms of the agreement should pay interest to the plaintiff as claimed.

I would affirm the judgment of the learned County Court Judge and dismiss this appeal with costs.

Appeal dismissed with costs.

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COURT OF APPEAL

EINARSON v. CITY OF WINNIPEG

Before PERDUE, C.J.M., CAMERON and HAGGART, JJ.A.

Municipal Corporations—Negligence—Failure to Promptly Replace Plank in Sidewalk after Notice of Defect—Defect Noticed not the Same that Caused Accident.

Plaintiff was injured by the breaking of a rotten plank in a sidewalk which by statute defendant municipality was bound to keep in repair. The rottenness of the plank was not apparent on the surface but three days before the accident the city inspector had marked and reported the plank for re-placement because of a hole in one corner of it that he feared the heel of a lady's boot might catch in. The jury found that defendant was negligent in not replacing the plank more promptly and gave plaintiff damages. *Held* their verdict should not be disturbed.

ARGUED: 25th November, 1919.
DECIDED: 12th December, 1919.

Statement. Appeal by defendant from a judgment by Galt, J. on verdict of a jury in an action for damages for personal injuries sustained by a fall caused by the breaking of a plank in a sidewalk. Appeal dismissed with costs.

T. A. Hunt, K.C. and *J. Preudhomme,* for defendant, appellant.

G. C. Lindsay, for plaintiff, respondent.

PERDUE, C.J.M.—The plaintiff sustained an injury by a fall caused by the breaking of a plank in a sidewalk on Sargent Avenue in the city of Winnipeg. The plaintiff was returning home with two friends at about 11 o'clock at night. The plank broke when he stepped on it and he fell and one of his hands was injured, a bone being broken. The plank which broke appeared to be sound on the upper surface but had rotted underneath. The sidewalk was 14 years old but, according to defendant's witnesses, was still generally in good condition. On July 23, the defendant's inspector examined the portion of the sidewalk in question. He noticed that the plank which afterwards caused the accident had a little piece out of the corner of it. He marked the plank to be taken out and replaced by a new one, lest, he says, the heel of a lady's boot might get caught in the hole, and an accident be caused. The inspector's report calling for a new plank was sent to the proper authority on the evening of July 23. The

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accident to the plaintiff took place on the night of July 26. On the morning of July 27, a repair gang came and put in a new plank.

The defendant claims that the plank was condemned by the inspector for a minor defect which did not call for immediate repair and that the rotten state of the plank was not known to him. If the inspector had known the true condition of the plank, he would, it is said, in accordance with custom, have indicated in his report that it required immediate attention. But the answer made to this is that the corporation through its proper officer had notice that the plank was defective and he had ordered it to be replaced; that if the repair had been made promptly, the accident would not have happened. The cases cited by defendant's counsel, namely: *Breault v. Town of Lindsay,* 10 O.W.R. 890; *McNiroy v. Bracebridge,* 10 O.L.R. 360, 6 O.W.R. 75; *Forrest v. Winnipeg,* 18 Man. R. 440, 10 W.L.R. 307; *Davies v. Winnipeg,* 19 Man. R. 744, 15 W.L.R. 22, and others, related to the sufficiency of constructive notice. In the present case the contention of the plaintiff is that the defendant had actual notice of the unsafe condition of the plank. I think it was enough to bring home notice to the defendant if the attention of the proper officer of the defendant was called to a defect in the plank which rendered it dangerous, although it was another defect in the same plank which caused the injury and not that of which the officer had notice. See *Holland v. Tp. of York,* 7 O.L.R. 533, 3 O.W.R. 287. The jury has found that the defendant was negligent in that it did not more promptly replace the defective plank. This was essentially a question for the jury and there was evidence upon which the jury might find as it did.

I think the appeal must be dismissed with costs.

CAMERON, J.A.—The plaintiff was walking, with his companions, on the wooden sidewalk on the south side of Sargent Avenue, near Maryland Street in this city on the evening of July 26, 1918, when a board in the sidewalk gave way, his foot was caught therein and he was thrown to the ground and sustained personal damage, the fifth bone of his right hand being permanently injured. He brought this action to re-

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cover damages and the same was tried before Mr. Justice Galt and a jury, who gave a verdict for the plaintiff for $500.

From the judgment entered on this verdict the defendant appeals. Objections were taken to portions of the charge to the jury of the learned trial Judge, but these were not pressed and this Court was not asked to grant a new trial but was urged to set aside the verdict of the jury as unwarranted by the facts of the case, and by the law applicable thereto.

At the conclusion of his charge the trial Judge submitted the following questions:

(1) Was the plaintiff's injury caused by negligence of the defendants?

(2) If so, in what did this negligence consist?

(3) What damages has the plaintiff sustained?

The jury returned to Court and announced that they had agreed upon a verdict for the plaintiff, assessing the damages at $500. The foreman read the verdict, which was as follows:

> We, your jury, beg to report that we find for the plaintiff; that while the system of inspection and repair of board sidewalks is satisfactory, but in this particular case, in the carrying out of same the City was negligent in that it did not more promptly replace the defective board, and we assess the damages at $500.

Here we have the jury making a finding upon the precise matter upon which the city relied as a defence. Obviously we ought not to interfere with that finding except upon the clearest grounds.

The city's system of inspection and repair of board sidewalks is given in detail by W. F. Tallman, the street commissioner since 1907. Inspectors for different divisions start out with sheets of paper and if they find a loose or broken plank they note it on the sheet. These sheets are turned in at night to the repair gang "that goes out the next morning and they are turned in the next morning."

The inspectors, five in number, themselves carry hammer and nails and if they find a loose plank they nail it. There are five to seven repair gangs and an extra one or two are added if needed. The sidewalk in question is inspected about every

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10 days. Tallman says the life of a wooden sidewalk varies according to the quality of the lumber and other circumstances, and gives from seven to ten years as an average period. He explains what are called "special sheets" in this way:

A repair gang may be out and there is something not on the sheet that he sees wants repairing; the foreman is not allowed to put it on the sheet, but he has a special sheet and puts it on there.

If a police officer notifies the department by telephone of a broken plank, that matter is always attended to on the same day.

McDowell, the inspector of the district in question, says he covers it every 11 days, or, if a Sunday intervenes, in 12 days. His reports were put in as exhibits. On July 23, he noticed the plank that caused the accident and says of it:

There was a little three cornered piece out of this plank; it was seemingly a good plank, but this little piece was out of the northwest corner of it, and I marked that plank for a new plank lest the heel of some lady's boot might catch there and throw her.

The plank did not appear to him to be rotten. He is asked further on, "And so far as the top was concerned, it appeared all right?" To which he answered, "the rest of the plank was quite sound." That is so far as the top is concerned.

On cross-examination, McDowell says that when he made his recommendation on the 23rd, he expected the repair to be done in two or three days afterwards. If the repair gang were not behind in their work "they should have done it the next day."

McGuire, the foreman of the repair gang, is shown Ex. 2, 2241, with his signature, showing the date of the report as July 23, and that the repair, "1 new plank," was made by him July 27. He says that when he went to find the plank he found the inspector's mark on it "McD." Afterwards he got instructions on the 27th at one o'clock about this defective plank and when he went there found the repairing had been done.

Evidence was given to show that one of the foremen, Bie, engaged in this district with McGuire, had in April cut his ankle with an adze and was laid off accordingly. The object

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of giving this evidence was apparently to account for the delay.

As for the condition of the plank itself, there is direct evidence on this point. Johannson, a friend of the plaintiff, went with him to the place where the accident occurred and saw the new board that had just been put in and the old board lying there in "two rotten pieces" in a very bad condition. The plaintiff says he happened to stick his foot through the sidewalk or stepped on a rotten board that sank down when he got his toe stuck in the sidewalk. Joseph Johnson was with the plaintiff on the night of July 26, and says of him: "He stepped on a rotten board in the sidewalk" and that he noticed "the centre stringer on the street side of the board had broken away and it sagged down about four inches where it broke."

According to Tallman that sidewalk was constructed in 1904, and has not been rebuilt.

Now it is clear that McDowell, a city official, saw this defective plank on July 23, and noted it in his report with the recommendation "1 new plank" and that the recommendation was not carried out until July 27. Tallman was asked on his examination on discovery: "An important thing is that the City knew on the 23rd of July of that defect?" To which he answered, "Yes, they knew there was a new plank required there."

What is the effect of the finding of the jury? It is that the city's system is satisfactory but that the application of it in this instance was delayed too long. The repair work that should have been done on the first or second or even the third of the days after McDowell marked the plank and sent in his report was not done until the fourth day after. There must must be a dividing line somewhere. Tallman says the repairs are as a rule done the next morning after the report and McDowell says within two or three days. The jury has said the fourth day was too late to relieve the city from the charge of negligence and there is the evidence of the city's witnesses on which the jury were at liberty to base this finding.

Sec. 731 of *The Winnipeg Charter, 1918*, ch. 120, 8 Geo. V., provides that every public road, street, bridge and high-

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way, and every portion thereof, shall be kept in repair by the city, and in default of the city so to keep in repair, the city shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default. This is substantially the provision governing municipalities under the general *Municipal Act*, secs. 624 and 625, R.S.M., ch. 133.

Now, the Court is asked in this case, notwithstanding this provision imposing a positive and unconditional liability for damages occasioned by the city's default, to go behind the verdict of the jury, when the facts and the law have been fairly submitted to them, examine the evidence and determine whether or not the finding of the jury is in accordance therewith. If there be any evidence to support the finding it should not be disturbed. Here the evidence on which the jury finds is mainly that put in by the defence. The jury have held that on that evidence the repairing of the walk was done too late.

We were referred to several cases: *Breault v. Town of Lindsay*, 10 O.W.R. 890; *McNiroy v. Bracebridge*, 10 O.L.R. 360, 6 O.W.R. 75; *Lottine v. Mun of Langford*, 28 Man. R. 282, [1917] 3 W.W.R. 778; *Bell v. Winnipeg* [1919] 2 W.W.R. 535, and *Rushton v. Galley*, 21 O.L.R. 135, 16 O.W.R. 12, 1 O.W.N. 754. These are, however, cases of constructive notice, and the difference between them and this is apparent. Here the city had actual notice through McDowell, the inspector, who marked the defective plank for renewal on July 23. The delay in repairing was considered by the jury too great and I see no reason to interfere in their finding. That delay in repairing was due to an accident to one of the city's foremen is immaterial and cannot affect the rights of the plaintiff.

It was urged that McDowell's inspection revealed only a chipping from the plank and no inherent weakness, and that there was, therefore, no notice of the real defect. But he marked the plank for complete renewal, "1 new plank," and if that recommendation had been followed by action on the following day, or the day after that, or on the day after that again, there would have been no accident. On this branch of

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the subject of notice I refer to *Denton on Municipal Negligence*, p. 238. If the notice refers to another defective spot close to the one creating the danger, it is sufficient if the repair of the one would of necessity draw attention to the other. *Holland v. Tp. of York*, 7 O.L.R. 533, 3 O.W.R. 287.

I would dismiss the appeal.

HAGGART, J.A. concurs.

Appeal dismissed with costs.

COURT OF APPEAL

REX v. ROYAL BANK OF CANADA

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

I. Agency—Banks and Banking. II. Crown. III. Evidence.

I. Agency—Banks and Banking—Scope of Agent's Authority—Ostensible Authority—Bank Paying Agent Proceeds of Cheque—Liability of Bank to Principal.

A clerk employed in the business of the Canadian government elevators whose express duties were to collect amounts due from grain dealers for freight charges, etc., and on presentation of bills of lading and payment of charges to hand out warehouse receipts, and deposit all moneys collected to the credit of the Receiver-General in a designated bank and at certain intervals to remit by draft to the head office of the business, and which charges were almost always paid to him by accepted cheque although they might have been received in cash if so tendered, was ***held*** to have no authority to cash any cheques paid to him or any ostensible authority justifying any bank giving him the cash for any such cheque. Defendant bank which cashed such a cheque on it, paying said clerk the proceeds, was held negligent and liable for the amount thereof to the clerk's employers. Enquiry should have been made as to the clerk's authority. Also the unusual act of a business firm cashing such a cheque, especially of a large amount, and a certain discrepancy between the name of the payee in the cheque and the name in the endorsement should have aroused suspicion. The fact that the clerk had previously bought drafts in the defendant bank in favour of "Canadian Govt. Elevator" signing a requisition as "Mgr." did not excuse the bank for cashing the cheque.

II. Crown—Not Liable for Negligence of Officers—Not Bound by Estoppel.

The Crown is not liable for the negligence of its officers (per Perdue, C.J.M.). It is not bound by estoppels though it can take advantage of them (per Cameron, J.A.).

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III. Evidence—Action for Negligence—Evidence of Subsequent Similar Acts—Inadmissibility. 1919

In an action against a bank for negligence in cashing a cheque, evidence of the subsequent cashing of similar cheques, adduced for the purpose of showing negligence, was excluded. (Evidence of prior cashing of similar cheques was admitted.)

ARGUED: 3rd November, 1919.
DECIDED: 1st December, 1919.

Statement.

Appeal by defendant from a judgment by Metcalfe, J. in an action for the amount of a cheque on defendant bank which plaintiff claimed defendant bank had improperly cashed. Appeal dismissed with costs.

S. E. Richards, K.C. and *W. L. McLaws,* for defendant, appellant.

A. J. Andrews, K.C. and *F. M. Burbidge,* for plaintiff, respondent.

PERDUE, C.J.M.—This action is brought on a cheque for $673.68, drawn by Woodward & Co., grain merchants, on the Grain Exchange branch of the Royal Bank of Canada, in favour of "Dominion Govt. Elev. Co." The words, "Canadian Government Elevator," are stamped on the back of the cheque with a rubber stamp and underneath these words there is written, "Per F. S. Burgess." The cheque in question was given in payment of charges due from Woodward & Co. to the Dominion government in connection with wheat received and stored at the terminal elevator, Port Arthur. It is claimed that the proceeds of the cheque were improperly paid by the bank to F. S. Burgess who was in charge of the Dominion government elevator business at Winnipeg and who kept the money for his own use.

By *The Canada Grain Act,* 2 Geo. V., ch. 27, a commission was created under the name of "The Board of Grain Commissioners for Canada" (sec. 3). Power was given to the Governor in Council to authorize the Minister of Trade and Commerce to construct, acquire, lease or expropriate for His Majesty any terminal elevator. Upon the construction or acquisition by His Majesty of any terminal elevator the Board is charged with its operation and management and may, with the approval of the Governor in Council, make regulations for its

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management and operation and prescribe a tariff of fees (sec. 13).

Pursuant to the powers conferred by the Act terminal elevators were constructed or acquired at several points, one of them being at Port Arthur, Ontario. Operation of these elevators was then undertaken by the Board. Cars of grain shipped to the elevator were unloaded and inspected. The grain was graded, cleaned and dried, if necessary. It was stored in the elevator and the freight and other charges were paid by the Board. The owner of the grain on production and surrender of his bill of lading, and on payment of the charges against the grain, received a warehouse receipt.

In 1913, the Board found it necessary to have a man at Winnipeg to look after the business of the Board at that city. On October 14, 1913, F. S. Burgess was engaged as a clerk in the government elevator office, Port Arthur, at a salary of $85 per month. This man had previously been a clerk in a drug store. He was employed for a few days at the terminal elevator at Port Arthur, so as to acquire some knowledge of the work and was then sent to Winnipeg to take charge of the government elevator business in that city. At first he was given desk-room in an office in the Grain Exchange building, but afterwards had a room to himself in that building with two employees under him. He was known as the "Agent of the Canadian Government Elevators." The Board did not make regulations for the management and operation of elevators as they were empowered to do by the Act. The instructions given to Burgess were mainly verbal. Mr. Bright, the accountant of the Board at Port Arthur, explained to Burgess what his duties would be. Mr. Bright says:

> I told him that the owners of grain would present bills of lading of travelling cars of grain, and that on presentation of these bills of lading properly endorsed, and payment of all charges, he should hand out the warehouse receipts.

These warehouse receipts covering cars of grain received at the elevator were made out at Port Arthur and then sent to the Winnipeg agent, Burgess, together with sheets giving all particulars, including net bushels and freight charges. As bills of lading are often negotiated to purchasers, the name in

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the warehouse receipt was left blank, so that when the owner, whoever he might be, appeared with the bill of lading his name was entered in the warehouse receipt by Burgess and, on the surrender of the bill of lading and on payment of all charges for freight, grading, cleaning, drying, etc., the warehouse receipt was delivered to the owner. It is evident that Burgess had authority to receive payment of the charges in money. If the bills of lading in this case had been tendered by the owners together with the amount of the charges in bank notes and silver, Burgess would have had authority, and it would have been his duty, to receive the same and hand over the warehouse receipts. The charges, however, seem to have been paid almost always by accepted cheques. He was instructed to deposit the moneys received to the credit of the Receiver General in the Bank of Ottawa. Two stamps were provided for him, one of which read: "Deposit to credit of Receiver General, Canadian Government Elevator Account." The other stamp only differed from the first in that it contained the word "Dominion" in place of "Canadian." The moneys so deposited were, on Burgess' direction, forwarded by the Bank of Ottawa to the Receiver-General, passing through the Fort William office for the purposes of record.

It is admitted that the cheque upon which this action is brought was given

in repayment of moneys paid out by the Dominion Government Elevator for freight charges, weighing and inspection fees in connection with cars or cars of grain consigned to said Woodward & Co., and unloaded in the Dominion Elevator at Port Arthur.

It was therefore the duty of Burgess to impress the stamp furnished to him upon this cheque and deposit it in the Bank of Ottawa to the credit of the Receiver-General. Instead of doing so he put the endorsement on the cheque now appearing upon it, presented it to the teller of the Grain Exchange branch of the defendant's bank on which it was drawn and the teller paid to him the amount in cash. There is no doubt that Burgess appropriated the proceeds of this cheque and of many others that were cashed by the defendant's teller at the same branch.

Burgess, as I have shown, had authority to receive payment of the charges in cash. It is argued on behalf of the bank that

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Burgess having this authority would be entitled to receive the proceeds of the cheque, no endorsement being necessary when the cheque was presented for payment by the payee. But although Burgess had authority to receive cash when tendered to him, he had no authority to cash cheques given in payment of moneys due to the government. The instructions given to him were to deposit all cheques in the Bank of Ottawa in the manner already mentioned. The explanation given by the teller as to how he came to pay the cheque in question and many others presented by Burgess does not absolve him from negligence. In effect it was, that because Burgess came to him on July 7, and bought a draft in favour of "Canadian Govt. Elev." he, the teller, thought he was justified in paying on July 21 a cheque made payable to "Dom. Govt. Elev. Co." The fact that Burgess endorsed the cheque, "Canadian Government Elevator, per F. S. Burgess," showed a discrepancy between the name of the payee as written in the cheque and the name of the party purporting to endorse as payee. This was enough to arouse suspicion in the mind of any bank teller possessed of ordinary experience and discretion. Prior to this, the same teller had cashed two cheques of a firm of grain merchants for $658.87 and $891. 67, respectively, payable to "Dominion Government Elevator Co." The teller's explanation is that he thought the payees were grain merchants and that Burgess was their manager. It does not appear to have occurred to him that it was a most unusual thing, almost unprecedented in fact, for a business firm to cash cheques for such amounts instead of putting them through their own bank account.

A large number of cheques which were cashed by the defendant's teller at their Grain Exchange branch, subsequently to the cashing of the cheque sued upon, were put in on behalf of the plaintiff to show further acts of negligence, but these should not be looked at as they cannot affect the present transaction.

The burden of proving the authority of Burgess to receive payment of the cheque in question rests upon the defendant. In this it has failed.

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There is the further circumstance that the words "Dominion Government" and "Canadian Government" appear either on the face of the cheques or on the endorsement. This was a warning that the cheques dealt with public money belonging to the Dominion government and that such money should be paid to the credit of the account of the Minister of Finance, and Receiver-General: R.S.C., 1906, ch. 24, sec. 35; 4 & 5 Geo. V., ch. 33, sec. 1.

It was urged by counsel for the defendant that the Board of Grain Commissioners were negligent in the manner in which they conducted the business of the Commission at Winnipeg. Burgess was in charge of the office at that city. He made returns to the Board, but, as it is claimed, so slight was the control exercised over him that in a period of about five months he was able to appropriate over $140,000 of the moneys collected by him. It is urged that the salary paid to him, namely, $85 per month, was quite insufficient to support him and his family and to enable him to maintain some degree of respectability as the incumbent of a government office. The importance of the position he filled is shown by the fact that in the single year ending July 31, 1916, he collected for the Board $3,352,512. It was suggested that his peculations were, in the beginning, induced by his necessities, and that he took larger and still larger amounts when he found how easy it was to steal and avoid detection.

But the stolen moneys belonged to the Crown and the Crown is not liable for the negligence of its officers. In *Viscount Canterbury v. Atty.-Gen.*, 1 Ph. 306, 12 L.J. Ch. 281, a petition of right was presented claiming compensation for loss by fire alleged to have been caused by the negligence of the Commissioners of Woods and Forests. In the following passage taken from the report Lord Lyndhurst deals with the position of the Crown (1 Ph. at p. 323):

> Now, assuming that the fire had been caused by the personal negligence of the commissioners, would the Crown, in such case, have been liable to make good the loss? They are indeed styled servants of the Crown; but they are, in truth, public officers appointed to perform certain duties assigned to them by the Legislature, and for any negligence in the discharge of such duty, and any injury that may be thereby sustained, they alone are, I conceive, liable. Is it supposed that the Crown is responsible

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for the conduct of all persons holding public offices and appointments, and bound to make good any loss or injury which may be occasioned by their negligence or delinquency? * * * The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not, on that account, subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act done, had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agents whom they appoint and remove, and with the selection or control of whom the Crown has no concern.

No negligence was established, if such could be established, against the Crown. On the other hand, it is clear that the defendant's teller who cashed the cheque was guilty of negligence and his negligence was the direct cause of the loss of the money.

The appeal should be dismissed with costs.

CAMERON, J.A.—In the statement of claim in this action it is alleged that Woodward & Co., grain dealers, drew a cheque, dated July 21, 1916, on the defendant bank for the sum of $673.68, payable to the order of His Majesty under the name of "Dominion Government Elevator," a name used by the Department of Trade and Commerce, one of the Departments of His Majesty's government of the Dominion of Canada, in carrying on the business of the Department. It is further alleged that Woodward & Co. delivered said cheque to the plaintiff whereupon it became the property of the Dominion of Canada and negotiable only by deposit to the credit of the Receiver-General and that on or about July 21, one Burgess, an employee of the plaintiff, forged an endorsement on said cheque and delivered same to the defendant bank. It is further stated that said cheque was one of a large number payable to the Dominion government elevator, endorsements on which were similarly forged by Burgess, under such circumstances that the defendant bank knew or should have known of the criminal action of Burgess and that it was by reason of the negligence of the defendant bank that Burgess was enabled to carry out his fraudulent designs. The plaintiff demanded payment of the said cheque from the defendant bank, which was refused.

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By the statement of defence, the allegations of the statement of claim are specifically denied and it is charged that Burgess was the agent and manager for the Canadian government elevators at Winnipeg; that as such agent Burgess was authorized to collect transportation charges in respect of warehouse receipts entrusted to him either in cash or by cheque; that the plaintiff gave Burgess the authority or ostensible authority to collect the amount of such cheques; that Burgess endorsed the said cheques in the course and within the scope of his employment and that the defendant bank acted honestly throughout. It is further alleged that the cheque sued on was presented for payment by one who had authority or apparent authority to endorse it, that it was complete and regular on its face and was paid in the ordinary course of business.

The action came on for trial before Mr. Justice Metcalfe, who entered judgment for the plaintiff, and from this judgment the bank appeals, the principal ground taken being that Burgess had authority to endorse the cheque in question.

The head office of the business described and known as that of the Canadian Government Elevators was, and is, at Fort William, Ontario. That business was, and still is, carried on by a commission known as the Board of Grain Commissioners, acting under the Department of Trade and Commerce. This commission was created, and its powers defined, by ch. 27, 2 Geo. V. By sec. 13 of that Act the commission was charged with the operation and management of terminal elevators duly acquired by the Minister of Trade and Commerce. This sec. 13 was amended by sec . 1 of ch. 33, 4-5 Geo. V., by adding thereto the following provision:

4. Advances to an amount not exceeding five hundred thousand dollars may be made to the Minister out of the Consolidated Revenue Fund of Canada for the payment of freight charges and weighing and inspection fees on grain received into or shipped from elevators operated and managed by His Majesty. Such payments shall be subject to all the provisions and regulations in that behalf of the Consolidated Revenue and Audit Act, and when the amounts so paid are from time to time refunded to His Majesty such amounts shall be paid to the Minister of Finance and Receiver General of Canada for deposit to the credit of the said Consolidated Revenue Fund.

It is to be noted that;

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all public moneys, from whatever source of revenue derived, shall be paid to the credit of the account of the Minister of Finance and Receiver General through such officers, banks or persons, and in such manner as the said Minister, from time to time, directs and appoints. [R.S.C. ch. 24, sec. 35].

In October, 1913, an entry appears in the minutes of the Board showing the appointment of Burgess as a clerk. He was employed in Port Arthur for about a week. Subsequently he went to Winnipeg as a clerk, his position, as such, being strictly defined. He was to collect the amounts due by the grain dealers as refunds to the government of advances made for freight charges under the above subsec. 4, sec. 13. His business was to receive bills of lading and the cheques for refunds and give in return warehouse receipts. The moneys received by him were government moneys to be deposited to the credit of the government with the Bank of Ottawa. Burgess had no office at first but had desk space in the office of the registrar, but later he had an office to himself with a clerk and stenographer. He was further authorized to sign split warehouse receipts for registration in the office of the registrar. This all appears in the evidence of Mr. Bright, accountant for the Board of Grain Commissioners, where we find the following letter from Mr. Birkett, secretary of the Board, to Burgess:

17th October, 1913

Mr. Burgess,
608 Grain Exchange Blg.,
Winnipeg, Man.

Dear Sir:

I have just been speaking to Mr. Bright in reference to the depositing of funds collected in connection with the Dominion Government elevator. All moneys collected will have to be deposited to the credit of the Receiver-General in the Bank of Montreal, or the Bank of Ottawa, Winnipeg, and every so often, say twice a week, you will get a draft from the bank which you will forward to this office, along with the duplicate and triplicate. The bank supplies the forms. It is pretty hard to explain the system that they work under, if you are not used to this sort of work, and I would suggest that you go in and see Mr. J. Smith, Chief Clerk for Inspector Serls. He will explain to you fully what he does in connection with their funds. You will follow out exactly the same lines.

Yours truly,
[Sgd.] C. Birkett,
Secretary.

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Two letters from the secretary to Mr. Todd are in evidence. The first is dated October 15, and is as follows:

This will introduce to you Mr. Burgess, who has been delegated by the Board to take care of the Government Elevator business at Winnipeg. I understand from Commissioner Jones that he will be given desk space in your office. Please extend to him the usual courtesies, and oblige.

And the second, dated October 17, 1913, is as follows:

Please note that Mr. F. S. Burgess, who is taking charge of the Winnipeg end of the Dominion Government Elevator business, is authorized to sign split warehouse receipts for registration in your office. The countersigning will be done on surrender of the paper.

Following the course of events we find in the exhibits a cheque, issued by Peaker Bros. & Co., drawn on the Bank of British North America, dated June 30, 1916, payable to Canadian "Government Elev." endorsed "Canadian Government Elevator per F. S. Burgess," and paid by the defendant bank, July 3. Nothing was said about this cheque on the argument and it is referred to only incidentally in the evidence by Scott, the auditor. Apparently it was not in the possession of plaintiff's counsel on Eden's examination.

On July 7, Burgess purchased from the defendant bank two drafts for $112.72 and $288.70 respectively. The requisition forms are signed by "F. S. Burgess, Mgr." and "F. S. Burgess." Eden, the bank's teller, from whom these drafts were purchased refers in his evidence to these two purchases as one transaction and gives their date as the date of his first meeting with Burgess. He is not asked about, and does not offer any account of, the Peaker Bros. cheque which apparently left no impression on his memory.

There was, according to the teller, no conversation in connection with these drafts, at least none that he remembered. He remembered seeing Burgess and that is all. The drafts were paid for in cash, no introduction was necessary and any stranger would have been treated the same way.

Next in order comes the cheque of McLaughlin & Co. on the Bank of Montreal (and accepted by that bank) for $658.87, payable to the order of "Dominion Government Elevator Co." It is endorsed "Canadian Government Elevator, per F. S. Burgess, Mgr." and was cashed by the defendant

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bank, July 8. On being questioned as to this cheque the teller positively states that this cheque was the first cheque he cashed for Burgess and reiterated that the occasion of the purchase of the draft was the first time he saw him. He is asked, "You had not been introduced to him, other than the introduction that he himself gave you?" and answers, "That draft was all." The teller knew that neither the Dominion Government nor McLaughlin & Co. were customers of his bank. Nothing took place on the occasion of the cashing of this cheque further than that it was presented by Burgess and the cash handed over. No inquiry as to Burgess' authority was made. "I," he says, "just thought he had the authority," and when asked, "What facts led you to that conclusion?" he replies, "He signed the requisition as manager." This is plainly incorrect as is shown by the Peaker Bros.' cheque.

Then cheques are cashed by the teller for Burgess as follows: (1) Cheque, dated July 10, issued by Benson-Newhouse, Slabeck & Co. for $625.86, on the defendant bank, (2) Cheque, dated July 12, by same company for $387.94 on defendant bank, (3) Cheque, dated July 20, issued by McLaughlin & Co. for $891.67 on the Bank of Montreal, (4) (4) Cheque, dated July 20, issued by Hanson Grain Co., for $471.89 on the Bank of Nova Scotia. All these were cashed on the day of their issue or on the day following.

Next comes the cheque, dated July 21, for $673.68, payable to "Dom. Govt. Elev. Co." which is endorsed "Canadian Government Elevator per F. S. Burgess" and is the cheque sued on. The difference between the name of the payee on the body of the cheque and that endorsed on it was not noticed by the teller at the time of the transaction or until his examination. Again, with reference to this cheque (as in the case of that of McLaughlin & Co.) when asked, "You say you assumed he had the authority; what fact was known to you which gave you the right to assume that?" the teller replies, "The fact that he signed the requisition as manager." It was nothing that Burgess said as there was no conversation between them and no representations were made by him. The teller knew nothing about the Dominion government elevator

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being an instrumentality or branch of the Dominion government and seems to have been of the impression it was an incorporated trading company.

Now, we have it established that no representations were made to the teller or to the bank by anyone on behalf of the Crown other than the representations made by Burgess. The teller knew nothing of Burgess, he says, until he came in to purchase the drafts referred to and nothing then occurred of any significance except that to one of the requisitions he affixed his name as "Mgr." The purchase of a draft for cash involves no question as to the identity of the purchaser as that is immaterial. There is no possible liability to the bank in the transaction. The cash is taken in and the draft is handed out. That dealing is a different matter altogether from cashing a cheque payable to order. The practically universal rule is that cheques payable to corporations are deposited and if the corporation requires currency it issues its own cheque for that purpose. The plainest dictates of prudence point out this as the safe method for all concerned.

Again I wish to point out the importance of the Peaker Bros. cheque. Though we have no specific evidence on the point, there is no doubt whatever that Eden was the man that cashed this cheque, and this was some days before Burgess bought the drafts. There can be no question of this though the teller says when asked about any cheques before July 8, "No, the buying of the draft was the first time I saw him."

But, apart from the Peaker Bros. cheque, and throwing it out of consideration altogether, the signing of the draft requisitions and their presentation to the teller with the accompanying currency, affords no reason whatever to justify the teller in thinking Burgess had authority to endorse cheques payable to his principal to be cashed over the counter. The two transactions are not related and are not in the same plane. No representations were made by Burgess other than those that were conveyed by his actions and one examines them in vain to find anything that has any significance as bearing on the question of his authority except the fact that he presented the cheque. But it is impossible to argue that his authority to

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endorse and cash the cheque can be inferred from the fact that he presented it to be cashed. That seems perilously near to reasoning in a circle.

The teller never had a similar experience in cashing for an individual a cheque payable to a corporation, not drawn on his bank. We need no expert evidence to tell us that this would be an unusual and dangerous practice. His laxity in the matter was extraordinary. The discrepancy between the endorsement and the name of the payee was unnoticed by him until his attention was called to it at the trial. One would have thought that his first idea on scanning the first of these cheques (or any of them for the matter of that) would be to submit it to the manager of the branch for his consideration and opinion. The law of self-preservation would indicate this as the obvious way of safety. And more than that, it was not his own money that he was blindly handing over to a man of whom he knew nothing and about whom he made no inquiry not even of the man himself.

In all the circumstances leading up to and connected with the presentation and cashing of this cheque, I can see nothing whatever that could in any degree justify any one in the teller's position in arriving at the conclusion that Burgess had authority to endorse a cheque for any other purpose than deposit or that he had authority to draw the cash for the cheque in question. The history of the transaction is so bare of incident that it is almost as if Burgess had for the first time stepped up to the teller at his window, slapped down the cheque in front of him, and the teller, without looking up, had counted out the cash and pushed it out of the window seeing and knowing nothing but the cheque itself. And after all is not that what took place when the Peaker Bros. cheque was presented? Certain it is no reasoning or argument based on the draft requisitions can be applied to that cheque.

Where a person has by words or conduct held out another person, or enabled another person to hold himself out, as having authority to act on his behalf, he is bound, as regards third parties, by the acts of such other person to the same extent as he would have been bound if such other person had in fact had the authority which he was held out as having [1 *Halsbury* 201. And see also *Bowstead on Agency* at p. 300].

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I cannot find in the evidence any words or actions on the part of the Crown in this case that can, with any regard to reason, be considered as holding out Burgess or as enabling Burgess to hold himself out as having authority to cash this cheque. The simple fact is that the teller cashed the cheque without any reflection and without attempting to exercise his judgment as a bank official in his position would be expected to exercise it in the circumstances. He carelessly overlooked the simplest precautions in a position that necessarily demands vigilance and in a case where the facts suggested and demanded further investigation and inquiry.

Now this branch of the law of agency is founded on estoppel, and even if there could be found in the case facts and circumstances sufficient to constitute Burgess an agent by estoppel, nevertheless the Crown is not bound thereby. "It appears from the authorities that the King is not bound by estoppels, though he can take advantage of them." (*Everest & Strode, Law of Estoppel,* p. 8). This rule has been frequently applied in Canada, and I am not aware that it has ever been rescinded or relaxed.

It was argued that, putting aside the question of the endorsement, Burgess had sufficient direct authority to collect the amount of the cheque. It is, I think, a rule almost without exception, that in Canada the bank requires an endorsement on a cheque payable to order, both for purposes of identifica- and as a receipt. In point of fact, I have no doubt that in this very case reliance was placed on the endorsement and that that was why the endorsement was put there. The idea behind this argument is that Burgess had authority to collect moneys and this covers his collecting an order (i.e., a cheque) by Woodward & Co., on the Bank of Montreal, which the Royal Bank was warranted in cashing for him. It did not, from this viewpoint, make any difference whether Woodward & Co. paid by an order on another person or by cash. In both cases Burgess' authority permitted him to collect the cash.

I have already set out the evidence relating to Burgess' position and authority.

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Counsel for the bank placed much reliance on the wording of the letter of October 17. "Funds collected" and "all moneys collected" it was argued were equivalent to stating, and implied, that Burgess was authorized to collect moneys, cash as well as cheques, and there was nothing in the letter to prevent him from collecting cash or inhibit him from turning a cheque into cash or currency. It is further argued that it is not stated in the letter that all *cheques* must be deposited to the credit of the Receiver-General but that all *moneys* collected must be so deposited. Further, it is said that if Woodward & Co. had paid in cash there would and could have been no objection. But we must take the letter of October 17, in connection with the facts. Burgess' duties lay in a small and well-defined circle. They were restricted to the simplest routine work. He got the bills of lading and the cheques from the dealers and if these were in order, handed over to them the government warehouse receipts. The word "moneys" used in the letter is a loose term and means cheques and the refunds were of course paid in no other way. Payments in cash, though not impossible, were never in contemplation. But taking it for granted that the letter gave Burgess authority to receive the refunds for advances by the government in bank bills, by what line of reasoning does that lead to the conclusion that he was thereby given authority to take a cheque payable to the government, endorse it, not for deposit to the credit of the Receiver-General, but to be cashed, and to receive the cash personally over the counter in return for the cheque? Nothing of the kind was intended or expressed or indicated. Burgess was to take the dealers' cheques when they handed them over and put them to the credit of the Receiver-General and that was the length and breadth of his authority so far as cheques were concerned.

In my opinion Burgess had no such authority as is contended. And I cannot see that he was shown to have had any ostensible or apparent authority that ought to have led anyone of the most ordinary prudence exercising a moderate amount of common sense, to disregard the simple precautions which would at once have checked these malversations. Apart from what is implied in the act of presenting the cheque and taking

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the cash, even Burgess himself made no assumptions or representations. And I cannot see that the Crown made any. And the Crown gave Burgess no authority, expressly or by implication, to do the acts complained of which are criminal in their nature.

I would dismiss the appeal.

HAGGART, J.A.—I have had the advantage of perusing the judgment of my brother Dennistoun. In his reasons he has set forth very fully and clearly all the facts and circumstances relevant to the matters in question in this suit. I would adopt his statement of these facts and I concur in the conclusion at which he has arrived.

As between the parties to this suit the cheque sued on—the document itself and the moneys represented by that cheque—was originally the property of the Crown. The onus of proof that the cheque and the moneys represented by it became transferred to the defendants is on the defendants. They have not satisfied that onus, and I could not find otherwise on the admissions and the evidence adduced at the trial.

At the trial and on the appeal counsel for the plaintiff made the same contention that this cheque was the property of the Crown and was payable to the Crown. Then there was the duty imposed upon Burgess to deposit it to the credit of the account of the Receiver-General for Canada and in the statute itself practically these provisions were made. I would dismiss the appeal and affirm the judgment of the trial Judge.

FULLERTON, J.A. concurs.

DENNISTOUN, J.A.—F. S. Burgess, a druggist's clerk, was on October 14, 1913, engaged as a clerk in the government elevator office at Port Arthur at a salary of $85 per month. He was presently transferred to Winnipeg as clerk of the the Board of Grain Commissioners with desk-room in the office of Mr. Todd, the deputy registrar of grain warehouse receipts, but at the time the events took place with which this case is concerned he had a room of his own with a stenographer and a boy in the Grain Exchange building.

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From October, 1913, until November, 1916, he carried on his duties as government elevator clerk at Winnipeg. In the latter month he became a fugitive from justice and as appears from the evidence, from cheques filed as exhibits, and from statements of counsel, the sum of upwards of $140,000 is unaccounted for to the government of Canada.

The authority with which he was actually invested is contained in certain letters defining his duties which are set out in the judgment of my brother Cameron and need not be reproduced by me. Stated shortly, it was his business to deliver warehouse receipts for grain in storage at Port Arthur, to the persons entitled to those documents, upon payment of transportation charges disbursed by the government. The funds so received by him were to be deposited to the credit of the Receiver-General of Canada in the Bank of Ottawa at Winnipeg, and for that purpose he was supplied with a rubber stamp which bore the words "Deposit to credit of Receiver General, Dominion Government Elevator Account." The word "Dominion" was subsequently changed to "Canadian" and a new stamp furnished accordingly.

The duty of Burgess to make deposit of all funds received by him was not only specifically set forth to him in the written instructions quoted but was statutory: 2 Geo. V., ch. 27, sec. 61; and 4-5 Geo. V., ch. 33, sec. 1.

It was assumed, as was the case, that all funds received by him would be represented by cheques, but I have no doubt that he had authority to receive cash if tendered in the ordinary course of business.

He had no authority to expend any money, either for office expenses or for any other purpose,

Although this action is brought upon one cheque only and that for a comparatively small amount, it is admitted that a large number of cheques for large sums of money were cashed over the counter by the defendant bank for Burgess. Most of these cheques were drawn on banks other than the defendant bank, which made collection from the drawee bank through the Winnipeg clearing house.

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These cheques were filed by consent of counsel, all rights being reserved as to their relevancy as evidence. The cheque sued on is one drawn on the Royal Bank of Canada, Grain Exchange branch, by Woodward & Co. for $673.68, dated July 21, 1916, marked accepted by the Royal Bank, payable to the order of "Dom. Govt. Elev. Co." and endorsed by rubber stamp "Canadian Government Elevator" to which is added by pen and ink "per F. S. Burgess."

It may be noted that the cheque is not properly endorsed, that the rubber stamp supplied by the government (Ex. 8) was not used, and that Burgess violated his instructions, which were to make deposits in the Bank of Ottawa to the credit of the Receiver-General.

Counsel for the bank state that they do not rely upon the endorsement as the money was paid by the bank to the person who had a right to receive it, and this appears to be the sole point upon which the case turns.

It is therefore necessary to determine the authority, both actual and ostensible, with which Burgess was clothed, and the negligence of the bank, if there be any, in making payment of the cheque in question in cash over the counter of the bank to bearer.

The actual authority of Burgess is determined by the letters and oral instructions referred to. He was authorized to take cheques or money in exchange for warehouse receipts and to make deposits to the credit of the Receiver-General, He had no other general authority except to sign split warehouse receipts when necessary.

I have no hesitation in stating that, having received a cheque payable to a government department in exchange for a warehouse receipt, Burgess had no actual authority to take that cheque to a bank and receive cash for it over the counter. When he did so he violated his express instructions.

While he was authorized to receive money when tendered for freight charges in the ordinary course of the business of the Grain Commission, in exchange for warehouse receipts, he had no authority to receive money for the government in

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any other way. He had no authority to endorse generally but was limited to a special endorsement for deposit only.

So much for his actual authority. It only remains to consider what was his ostensible authority.

Without any express representation being made the bank teller assumed that Burgess was the manager of a grain company with full powers as such. In this the teller was clearly negligent. The name which appeared on the back of all the cheques "Canadian Government Elevator" plainly intimated that the payee of the cheque was an official and not a commercial entity. He should from the very first have been upon his guard.

Moreover the endorsement "Canadian Government Elevator, per F. S. Burgess" was direct notice that the cheque was being negotiated not by the owner but by an agent *per proc.*

By sec. 51 of *The Bills of Exchange Act,* R.S.C., 1906, ch. 119, a signature by procuration operates as notice that the agent has but limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority.

In this case the endorsement "per F. S. Burgess" was sufficient to put the bank upon enquiry as to the agent's authority. Had a demand been made upon Burgess to disclose what his authority actually was, it must have appeared that he was a clerk with very limited powers: *Hambro v. Burnand* [1904] 2 K.B. 10, at p. 22, 73 L.J.K.B. 669; *Bryant v. La Banque du Peuple* [1893] A.C. 170, at p. 180, 62 L.J.P.C. 68.

The law is well settled that a principal is not bound by a payment to or settlement with an agent unless such payment or settlement be made in the ordinary course of business, and in a manner actually or apparently authorized by the principal: *Bowstead on Agency,* 4th ed., pp. 325 and 331; *Kaye v. Brett* (1850) 5 Ex. 269, 19 L.J. Ex. 346.

In the case of *Bank of England v. Vagliano* [1891] A.C. 107, at p. 128, 60 L.J.Q.B. 145, the bank officials drew the attention of Mr. Ziffo, the out-of-door manager of Vagliano

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Bros., to the fact that large bills were being presented across the counter and paid to the plaintiff's clerk Glyka, in bank notes, and Mr. Ziffo expressed the opinion that if the bills had been properly advised, they should be paid; moreover the payments so made were duly debited in Vaglianos' pass-book without objection on their part. The suspicious circumstance of the clerk asking for bank notes having been duly reported and acquiesced in by his superiors, the bank could do no more. Both Lord Halsbury, L.C., and the Earl of Selborne were of the opinion that after enquiry the bank was justified in charging such payments to the plaintiff's account, and was by its prudent action absolved from the charge of negligence.

In the present case, it being apparent at first sight that Burgess was an agent, the duty was cast upon the bank of making enquiry as to his powers and the limitations of his authority. In my judgment the only ostensible authority which Burgess had was to put himself forward as a clerk, the onus being upon the bank to compel full disclosure of his real authority: *Pole v. Leask*, 33 L.J. Ch. 155, 9 Jur. (N.S.) 829.

The bank made no enquiry whatever. It paid all manner of cheques drawn by grain merchants on various banks payable to "Canadian Government Elevator", "Dominion Government Elevator Co.", "Canadian Government Elevator Co.", and "Dominion Government Elevator." It paid no regard to the endorsement which was always "Canadian Government Elevator, per F. S. Burgess" or "per F. S. Burgess, Mgr." which in all but two instances was an improper endorsement. The cheque sued on is improperly endorsed. All of this is evidence of negligence on the part of the bank and in my opinion it was negligence which compassed the loss of these public moneys.

In determining what evidence of negligence there is in this case, care has been taken to exclude all the cheques which are admitted to have been cashed after July 21, 1916, the date upon which the cheque sued on was cashed, and to base this judgment upon what took place prior to that date, as disclosed by an examination of the six cheques which were cashed between June 20, 1916, and July 21, following.

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They are sufficient to have warned any careful banker that something most unusual was going on. That a clerk or even a manager should bring to a bank with which he had no account a series of cheques of third parties for which he demanded cash was in itself a most suspicious circumstance.

There is ample evidence in the case given by experienced bankers that the payment of such cheques was unbusinesslike and negligent on the part of the bank concerned. It is the practice of business houses to deposit all cheques payable to order in their own banks and when cash is required to draw it by means of cheques signed by themselves. Otherwise a valuable record of business transactions is lost and a door is opened wide to peculation and fraud.

It is a matter of common occurrence that a clerk has authority to receive cash or cheques and to give valid receipts therefor in the ordinary course of his employer's business. It does not follow that he has any ostensible authority to present cheques payable to his employer, endorsed by himself, for payment in cash over the counter of a bank, and the bank that pays him without enquiry is clearly negligent.

It appeared at the trial that certain restitutions had been made by Burgess prior to his flight and some attempt was made to show what application had been made of the moneys restored, but the point was not cleared up, and was not argued on appeal. It has therefore received no consideration from me as the parties appear to desire judgment on the general issue and not on this special point.

Two cases referred to on the argument are valuable as exhibiting legal principles which are applicable: *Toronto Club v. Dominion Bank*, 25 O.L.R. 330, 14 O.W.R. 261, 20 O.W.R. 781, 3 O.W.N. 460, relieves the bank from responsibility in the case of an agent who was held to have actual authority to endorse and receive money on behalf of his principal. *Ross v. London County Westminster & Parrs Bank* [1919] 1 K.B. 678, 35 T.L.R. 315, holds a bank liable for negligence in dealing with official cheques without sufficient enquiry as to the authority of the bearer who deposits them at his own credit.

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Neither of these cases is on all fours with the present case, in so far as the facts are concerned.

Upon the whole case I am of opinion that the plaintiff has established the negligence alleged in the statement of claim and is entitled to judgment; that the defendant bank has failed to establish the agency of Burgess, actual or ostensible, to receive this sum of money over their counter, and has failed to show that it acquired any title to the cheque in question by means of a valid endorsement.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

COURT OF APPEAL

JAMIESON v. MOORE

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

The War Relief Act, 1918, S. 10—Recovery by Vendor of Amount Fixed by Attornment Clause in Agreement of Sale.

A purchaser under an agreement of sale claimed the protection of *The War Relief Act, 1918.* A clause in the agreement purported to create the relationship of landlord and tenant at a yearly rental corresponding to the instalments of principal payable. At the trial Macdonald, J. ([1919] 2 W.W.R. 49) held that under sec. 10 of the Act the vendor might recover from the purchaser the amount of the rental value of the land as shown by leases made and rentals received by the purchaser, the same not exceeding the interest due. Appeal by the purchaser was dismissed by the Court of Appeal which was of opinion that had the vendor cross-appealed he should have recovered under sec. 10 of the Act the rentals fixed by the attornment clause in the agreement (to the extent of the interest due, etc., under the limiting clause of sec. 10).

The judgment should be considered as a recovery *pro tanto* only and without prejudice to the vendor's right to sue for the remainder of his claim (per Perdue, C.J.M.).

Semble sec. 19A of the Act added by subsequent amendment, which empowers a Judge to dispense with restrictions contained in the Act, is retrospective so that a Judge at trial may make an order thereunder although the proceedings were pending when the amendment came into operation (per Perdue, C.J.M.).

ARGUED: 12th December, 1919.
DECIDED: 23rd December, 1919.

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Statement.

Appeal by defendant from a judgment by Macdonald, J. ([1919] 2 W.W.R. 49) in an action by a vendor under an agreement of sale of land. Appeal dismissed with costs.

C. P. Wilson, K.C., for defendant, appellant.

A. B. Hudson, K.C. and *H. E. Swift,* for plaintiff, respondent.

PERDUE, C.J.M.—*The War Relief Act* of 1915 (5 Geo. V., ch. 88) barred during the continuance of the war the bringing of any action or proceeding against a person who was or had been since August 1, 1914, a resident of Manitoba and had either enlisted and been mobilized as a volunteer in the forces raised to serve in the war or had left Canada to join the army of His Majesty or of any of his allies, or against the wife or any dependent member of the family of such person for the enforcement of payment of his debts, liabilities and obligations existing or future, or for the enforcement of any lien, encumbrance or other security or for the recovery of any goods, lands or tenements in his possesion. By sec. 9 an exception was made whereby a person having a charge or security upon land had the right to collect the "rents or rentable values" of the land over and above an amount equal to $2,000 per annum.

In 1916, an Act, 6 Geo. V., ch. 122, was passed which amended the Act of 1915 by extending in some respects the protection afforded by the earlier Act to persons engaged in military service. The Act of 1916 also provided further exceptions in favour of mortgagees, vendors and other persons as against the persons for whose benefit the original *War Relief Act* was passed. Sec. 9 of the Act of 1915 is repealed by Act of 1916 and very material exceptions are added in place of those contained in the original clause. On the other hand, the period of time during which proceedings are stayed as against persons engaged in military service is extended in respect of the provisions contained in secs. 2, 3, 5 and 7. Sec. 5 of the Act of 1916 amends the corresponding section of the earlier Act by adding a clause that the provisions of the section in the original Act shall not apply to the case of

joint debtors who were such at the 1st day of August, 1914, one of whom is a person for whose benefit this Act is passed, but, in such case, the

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provisions of section 2 hereof as amended shall apply for the relief of all the joint debtors and their wives and dependent members of their families.

Sec. 10 of the Act of 1916 is as follows: "10. This Act shall apply to any actions or proceedings now pending:"

It is clear that the provision of the Act of 1916 were retrospective. Sec. 5 is made so by its express words. Sec. 9 of the later Act relating to sales of land by municipalities for arrears of taxes, declares that: "This amendment shall be construed to have been in force since the first day of April, A.D. 1915." Sec. 10 applies the provisions of the Act to pending suits.

In 1918, the Act, 8 Geo. V., ch. 101, [*The War Relief Act, 1918*] was passed. This Act repealed the existing Acts and was substituted for them: sec. 23. The Act came into force on March 6, 1918. It makes it unlawful to bring any action or take any proceedings against a person who is or has been at any time since August, 1914, a resident of Manitoba and has either enlisted or been mobilized as a volunteer in the forces raised by the government of Canada in aid of His Majesty in the war, adding to the branches of service mentioned in sec. 2 of the Act of 1915, aviation services and persons whe were drafted under *The Military Service Act, 1917*, 7-8 Geo. V., ch. 19 (Dom.). Sec. 2 provides that:

If any such action or proceeding was pending on the first day of April, 1915, or is now pending against any such person, the same shall be stayed until the expiration of a period of one year after the termination of said war.

Sec. 6 of the new Act corresponds to sec. 5 of the original Act as amended in 1916.

Sec. 8 suspends the running of all statutes of limitations of actions in favour of the persons benefited by the Act during the period from August 1, 1914, to one year after the termination of the war or from the time of the first accruing of the rights of action to one year after the war whichever shall be the shorter period.

Sec. 12 of the new Act corresponds to sec. 10A added by the Act of 1916 relating to proceedings commenced before or after the passing of the first *War Relief Act*.

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Sec. 13 of the 1918 Act repeats sec. 9 of the Act of 1916, the retroactive effect given to the section being in these words: "This sub-section shall be construed to have been in force since the first day of April, A.D. 1915." The other subsection is new.

Sec. 14 declares that secs. 10 and 12 and subsec. (1) of sec. 13 shall apply only to any actions or proceedings pending on or after March 10, 1916.

It appears to me that the Act of 1918, like the Act of 1916 which it replaces, is clearly retrospective in its operation. The intention of the Act is to re-affirm and continue the protection given by the Acts of 1915 and 1916 to persons engaged in military service for His Majesty, or any of his allies, and to supplement and more clearly define the extent of the protection already existing and the manner of exercising it. It repeals *The War Relief Act* and amendments in force when the present Act came into operation. It deals with and continues rights acquired under the repealed Acts. It declares rights as existing from a time anterior to the passing of the Act. Both the words of the statute and its declared object show that it is retrospective in effect. If it is retrospective in regard to the benefit and protection conferred upon persons engaged in military service it is also retrospective as to the exceptions. Sec. 10 of the Act of 1918 does not confer a new right of action on the plaintiff. *The War Relief Acts* barred the legal remedies of the creditors for a certain period and sec. 10 has merely removed the bar in certain cases so that pre-existing rights to sue might be restored to the extent mentioned in the section. The section really affects procedure only and that in itself makes the section retrospective in effect. *27 Halsbury*, 161.

An enacting clause which interferes with existing rights must be construed strictly, while the largest and most liberal construction is given to an exception which protects such rights. [*27 Halsbury* 160.]

Sec. 10 of the Act of 1918 declares that the Act shall not prevent a mortgagee or vendor or other person having a charge or security on land "from the right to collect and receive" the rents or rentable value of the land to the extent of the interest due and all taxes, etc.,

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and such rents or rentable values, shall be recoverable *from the tenant* or other person liable to pay the same or occupying the land or part thereof, by any remedy or proceeding as between landlord and tenant, or in any court of law in this Province.

The plaintiff in the present case is the vendor and the defendant is the purchaser of certain land and the latter is a person entitled to the protection afforded by *The War Relief Act, 1918*. In the agreement under seal which was executed by the parties and which contains the terms of the agreement it is declared that,

the purchaser [the defendant] shall hold the said land and premises as tenant to the vendor [the plaintiff] from the day of execution hereof at a yearly rental equivalent to, applicable in satisfaction of and payable at the same times as the instalments of principal hereinbefore provided to be paid; the legal relation of landlord and tenant being hereby constituted between the vendor and the purchaser.

As between the parties to the instrument this covenant is good, there being no collusion between the parties to interfere with the rights of third parties. In *Hobbs v. Ontario Loan & Debenture Co.*, 18 S.C.R. 483, it was held by Strong, Fournier, Gwynne and Patterson, JJ., Ritchie, C.J. and Taschereau, J. dissenting, that a clause in a mortgage similar in effect to the above and purporting to create the relationship of landlord and tenant between the mortgagee and mortgagor failed to give to the mortgagee a right to distrain for arrears of rent *as against the execution creditors of the mortgagor*. In that case the mortgagee had not signed the mortgage. It was, however, conceded by the Judges forming the majority of the Court that the relationship of landlord and tenant might be created as between the parties to the mortgage if the deed were executed by both mortgagee and mortgagor. Strong, J. said, at pp. 507-8 (18 S.C.R.):

The mortgagor himself would be considered as having incapacitated himself from asserting the invalidity of what he had deliberately affirmed to be the true relation between himself and the mortgagee in an instrument under seal, but as regards third parties interested in so doing I know of no reason why it should be confined to any particular class such as assignees in bankruptcy.

Patterson, J. said, at p. 552 (18 S.C.R.):

A mortgagor is at perfect liberty to agree that the mortgagee may distrain for all the mortgage moneys, principal as well as interest, without

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any regard to the value of the land, and whether the goods are on the mortgaged premises or elsewhere.

Ritchie, C.J., with whom Taschereau, J. agreed, held that the execution of the mortgage and the continuance in possession by the mortgagee constituted the relation of landlord and tenant and that there was nothing to prevent the parties from making such a contract.

In *Linstead v. Hamilton Provident & Loan Society,* 11 Man. R. 199, it was held by Killam, J. that a special attornment clauses whereby the mortgagor became tenant to the mortgagee, but which had not been executed by the latter, validly created the relationship of landlord and tenant between the parties. This case was followed by Curran, J. in *McDermott v. Fraser,* 25 Man. R. 298, 8 W.W.R. 196.

Sec. 10 of *The War Relief Act, 1918,* was not intended to confer upon a mortgagee or a vendor any other or greater rights or remedies than those which he possessed under the mortgage or the agreement. It would be strange indeed if in an Act specially intended to protect from his creditors a man engaged in performing military service for His Majesty, there should be contained a new and drastic form of remedy which did not exist in respect of the original contract. The right here sought to be enforced was created by the agreement executed by the parties.

I think that the relationship of landlord and tenant had been validly created between the plaintiff and defendant, and that sec. 10 permitted the plaintiff as landlord to pursue his remedy against the defendant, as tenant, by a suit in the Court of King's Bench, to recover the rent due to the plaintiff under the terms of the agreement, to the extent allowed by that section. In this view the plaintiff would be entitled to recover to the extent of the interest, taxes, insurance and any other moneys paid by the plaintiff in respect of charges payable by defendant; but as no cross-appeal was brought by the plaintiff the judgment entered by the learned trial Judge will have to stand ([1919] 2 W.W.R. 49). That judgment should be considered as a recovery *pro tanto* only, and should be without prejudice to the plaintiff's right to sue for the remainder of his claim.

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The War Relief Act, 1918, was amended at the late session of the Legislature; 9 Geo. V., ch. 111. By sec. 5 a new section (19A) is added which empowers a Judge of the Court of King's Bench or the registrar-general by order to dispense with all or any of the restrictions, prohibitions and conditions contained in the Act, and permit an action or proceeding to be commenced, or carried on, or taken on such terms as he may think fit, as if *The War Relief Act* had not been passed. This Act came into force prior to the trial of this action, so that the trial Judge might have made an order under the new section, if an application for that purpose had been made to him and he saw fit to grant it. In *Quilter v. Mapleson,* 9 Q.B.D. 672, 52 L.J.Q.B. 44, an action had been brought by a landlord to recover the demised property under a proviso for re-entry for breach of a covenant to insure. The plaintiff recovered judgment and defendant appealed. A stay of proceedings was granted so that the plaintiff did not obtain possession. On January 1, 1882, the *Conveyancing and Law of Property Act, 1881,* ch. 41, came into operation, after which the appeal was heard. It was held that the Act was retrospective and extended to breaches committed before the Act and to proceedings pending when the Act came into operation. The Court of Appeal held that it could grant to the tenant the relief to which he was entitled according to the law as it stood at the hearing of the appeal, the Court of Appeal having power to make such further or other order as the case may require. But under the view I take of the present case it does not seem necessary for the plaintiff to apply for and procure an order under sec. 19A dispensing with the restrictions and permitting the action to be carried on.

I think the appeal should be dismissed with costs, but that a clause should be added containing the proviso above mentioned, saving the plaintiff the right to sue for the remainder of his claim.

CAMERON, J.A. concurs.

FULLERTON, J.A.—By an agreement dated November 25, 1912, the defendant agreed to purchase from the plaintiff certain property for the sum of $30,000. When this action was

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brought on June 6, there was admittedly due under the agreement the sum of $13,820.65, made up of two instalments of principal due November 25, 1914, and November 25, 1915, of $5,625.40 each and interest from November 25, 1914, making up the balance.

The defence raised is that the defendant is a volunteer within the meaning of *The War Relief Act*, and that under the provisions of the Act and the several Acts amending the same the action is not maintainable.

The learned trial Judge has found ([1919] 2 W.W.R. 49) as a fact that the defendant on or about February 1, 1916, enlisted and was mobilized as a volunteer and was on February 16, 1916, appointed an honorary captain and quarter-master of the 183rd over-seas battalion, Canadian Expeditionary Forces.

The agreement between the plaintiff and the defendant contained the following provision:

> And it is further agreed between the parties hereto that until the completion of the purchase, the purchaser shall hold the said premises as tenant to the vendor, from the day of execution hereof, at a yearly rental equivalent to, applicable in satisfaction of and payable at the same times as the instalments of principal hereinbefore provided to be paid; the legal relation of landlord and tenant being hereby constituted between the vendor and the purchaser.

On August 16, 1917, the defendant made a lease of the premises to one Moore for a term of eight months computed from August 1, 1917, the rental being the sum of $300.

On March 1, 1918, the defendant made a lease of the premises to Moore for a term of one year, the rental being the sum of $500. In addition, the defendant received six dollars a month for six months for the use of a stable and five dollars a month for the use of a house for three or four months.

The learned trial Judge arrived at the conclusion that the case was governed solely by *The War Relief Act, 1918*, ch. 101, Stat. Man. 1918, and construed sec. 10 of that Act to mean

> that if the property sold or mortgaged has a rental value, the vendor or mortgagee has a right to such rent and the maximum amount that can be

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collected as rent shall not exceed the interest due, but if the rental value is less than the interest due, then such vendor or mortgagee is entitled to the actual rental value, and such rental value under section 10 shall be recoverable from the person liable to pay the same.

He then refers to the leases above mentioned and holds that plaintiff is entitled to recover against the defendant

rental values as proven by the leases referred to and the rentals received by the defendant from the occupation of the stable and house, in all, $856.00.

The defendant contends that in so far as the first lease is concerned the rights and liabilities of the parties are governed by the provisions of *The War Relief Act*, ch. 88, Man., 1915, and the several amendments thereto.

The submission of the plaintiff, on the other hand is, that *The War Relief Act, 1918*, ch. 101, Man., 1918, alone is applicable.

I think there can be no doubt whatever that if the plaintiff is driven to rely on *The War Relief Act* of 1915 and the amendments thereto, he cannot recover in this action.

The War Relief Act, 1918 repeals *The War Relief Act*. Sec. 23 enacts:

"The War Relief Act" being chapter 88 of 5 George V. Statutes of Manitoba and the Acts amending the same are hereby repealed and this Act substituted therefor.

Sec. 2 provides that

During the continuance of the said war, and for a period of one year thereafter, it shall not be lawful (save as hereinafter provided) for any person to bring any action or take any proceedings, either in any of the civil courts of this province, or outside of such courts, against * * * * a volunteer.

Sec. 10:

(1) This Act shall not prevent a mortgagee or vendor or other person having a charge or security on land from the right to collect and receive the rents or rentable value of such land to the extent of the interest due, and all taxes or levies and premiums of fire insurance payable by the mortgagor or vendee under any instrument affecting land, and also to the extent of all moneys which shall have been paid by a mortgagee or vendor in respect of any prior mortgage or charge upon such lands, and for the payment of which the mortgagor or vendee is liable, and such rents or rentable values, shall be recoverable from the tenant or other person liable to pay the same or occupying the land or part thereof, by any remedy or proceeding as between landlord and tenant, or in any court of law in this Province.

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Provided that, when the actual rents of any such property are less than the net rentable value, the mortgagee or vendor or other person having a charge on the land shall be entitled to collect and receive the net rentable value in manner aforesaid.

(2) Provided that the right to distrain shall not be exercised against the goods of any person for whose benefit this Act is passed, but the mortgagee or vendor or other person having a charge or security on the land shall, if such rent or net rentable values be not so paid, have the right to resort to all other remedies for the recovery of possession of the property notwithstanding anything contained in this Act.

The defendant maintains that this section creates a new cause of action and is not therefore retroactive.

In so far as it gives a vendor a direct remedy against the tenant it has been argued that it creates a new cause of action.

The question, however, with which we are concerned here is the effect of the section on the respective rights of the vendor and vendee.

Under the facts of the present case the plaintiff, if no legislation had been passed, would have been entitled to sue the defendant for the instalments of principal and interest from time to time as the same matured. He could also by virtue of the attornment clause in the agreement distrain for or bring an action to recover amounts of rentals equivalent to the instalments of principal and interest as the same from time to time matured.

Before any such proceeding was taken *The War Relief Act* of 1915 was passed, which prevented the plaintiff from bringing any action or taking any proceeding until one year after the termination of the war.

In the language of McCardie, J. in *Merchants Bank of Canada v. Eliot* [1918] 1 W.W.R. 698, at p. 700, this Act

does not invalidate any bargain; it does not limit any contractual rights; it does not affect the substance of any agreement; it merely precludes the creditor from commencing legal proceedings.

The War Relief Act, 1918, sec. 2, above quoted, prevents action or proceedings save in the cases therein provided.

Sec. 10, above quoted, permits a mortgagee or vendor to take proceedings, for the recovery of rents or rentable value.

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Whether or not as between vendor and vendee this section gives a new cause of action or merely removes to the extent provided the bar raised against the vendor's right to enforce his remedies depends on the construction of the section.

The section begins:

> This Act shall not prevent a mortgagee or vendor * * * from the right to collect and receive the rents or rentable value of such land.

The Legislature assumed that but for the provisions of the Act itself the mortgagee or vendor could collect and receive the rents of the land. As between the parties this could only have been done by virtue of the attornment clause in the mortgage or agreement.

As between the mortgagee and tenants of the mortgagor the mortgagee at common law might on default give notice to the tenant to pay the rentals to him.

Possibly a vendor, occupying, as he does, a position analogous to the mortgagee, might do the same.

Exactly what the Legislature had in view when it said that the Act should not prevent a mortgagee or vendor from the right to collect and receive the rents, etc., is difficult to make out, but I think it fair to assume that it at least had in mind the common practice in Manitoba of inserting attornment clauses in mortgages and agreements for sale.

The section then provides that

> such rents or rentable values, shall be recoverable from the tenant *or other person liable to pay the same* or occupying the land or part thereof by any proceeding as between landlord and tenant, or in any court of law in this Province.

The question is whether the words "other person liable to pay the same" include the volunteer. Unless they do, they are mere surplusage.

Provision is made for the liability of the tenant and the party occupying the land or part thereof. The only other person who could possibly be liable would be the mortgagor or vendee. Subsec. 2 of sec. 10 appears to me to show that subsec. 1 covers the case of a mortgagor or vendee.

It says that the right to distrain, which is, of course, one of the remedies given by subsec. 1, shall not be exercised against a volunteer.

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In lieu of the right to distrain the mortgagee or vendor is given the right to recover possesion from the volunteer.

I think on the true construction of sec. 10 the words "other person liable to pay the same" refer to, or at least include, the volunteer.

If the construction which I have put upon the section is the correct one, then the effect of the section is simply to restore in part the right to exercise the remedies which were suspended by the previous Acts and the section would, in so far as the parties themselves are concerned, affect remedies only and not rights.

Another construction that might well be put upon the section which would lead to the same result and a construction which would seem to be a reasonable one, is that the word "tenant" in the fourth line from the bottom of the first part of subsec. 1 is intended to mean and include the volunteer himself when he is occupying the premises as tenant under such an agreement as that in question.

The learned trial Judge construed the section in question as giving the vendor or mortgagee the right to recover from the mortgagor or vendee the rental value of the property up to the amount of interest due. The evidence in the case is directed mainly towards showing the rental value of the property.

With deference, I am of the opinion that under the facts of this case the plaintiff is entitled to recover the rentals fixed by the agreement and not the rentable value of the property. There has been no cross-appeal entered, and we would not, therefore, I think, be justified in entering judgment for the plaintiff for the full amount to which he is entitled.

The appeal will be dismissed with costs.

DENNISTOUN, J.A. concurs.

Appeal dismissed with costs.

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COURT OF APPEAL 1919

REX V. SCHOPPELREI

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

The Immigration Act—Order of Board of Inquiry for Deportation—S. 23 —Court without Jurisdiction.

Motion for release from custody of one held for deportation under an order of a Board of Inquiry was dismissed on the ground of want of jurisdiction in the Court by reason of sec. 23 of *The Immigration Act.*

ARGUED: 5th August, 1919.

DECIDED: 12th August, 1919.

Statement.

APPLICATION by way of *habeas corpus* and *certiorari* to release from custody one Oscar Schoppelrei, who was held for deportation under an order of the Board of Inquiry at Winnipeg, made in pursuance of the provisions of *The Immigration Act,* 9 & 10 Edw. VII., ch. 27. Motion dismissed.

Marcus Hyman, for appellant.

I. Pitblado, K.C., and *F.M. Burbidge, K.C.,* for respondent.

The judgment of the Court was delivered by

PERDUE, C.J.M.—This is an application by way of *habeas corpus* and *certiorari* to release from custody one Oscar Schloppelrei, who was held for deportation under an order of the Board of Inquiry at Winnipeg, made in pursuance of the provisions of *The Immigration Act,* 9 & 10 Edw. VII., ch. 27, and the amendments thereto. The grounds given in the order for the rejection and deportation of the applicant are that he "entered Canada by misrepresentation and refused to answer questions by the Board of Inquiry."

Schoppelrei made application for admission to Canada on March 1, 1918, at Fort Francis, Ontario. He handed to the immigration officer at that port the official Form 30 signed by him with the answers to the questions partly filled in. On being interrogated by the officer a change was made in the form as to the age of the applicant and the answers to certain unanswered questions were filled in. On this form the applicant stated that his birthplace was Quebec and that he was of Canadian citizenship. He was then admitted. On his examination under oath before the Board of Inquiry he stated that he was born at San Francisco in the United States and that he

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had not been in Canada before. The following question was put to him: "Will you tell me what you know about the Rank and File Club?" His counsel objected to the question on the ground that charges of sedition, seditious conspiracy and seditious libel had been laid against him and had not been withdrawn by the Crown. On advice of counsel the applicant refused to answer. For the same reason he refused to answer other questions of a similar character.

Sec. 23 of *The Immigration Act* is as follows:

23. No court, and no judge or officer thereof, shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

The applicant has not brought himself within the exception contained in the last two lines of the section. "Canadian citizen" is defined in subsec. (*f*) of sec. 2 of the Act. The expression means a person born in Canada who has not become an alien; or a British subject who has Canadian domicile; or a person naturalized under the laws of Canada who has not subsequently become an alien or lost Canadian domicile. The meaning of the expression "Canadian domicile" is defined in subsec. (*d*) of sec. 2. This subsection declares that Canadian domicile can only be acquired by at least five years' residence in Canada. The evidence of the applicant himself shows that he was born an alien and that he has been in Canada for less than 18 months. He cannot therefore bring himself within the exception contained in sec. 23. The section takes away the jurisdiction of this Court to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Board of Inquiry, unless the person affected is a Canadian citizen or has Canadian domicile.

On the ground of want of jurisdiction in this Court the motion should be dismissed.

Motion dismissed.

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COURT OF APPEAL 1919

PEDLAR V. CARSWELL

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

Promissory Note—Consideration—Endorsee of Old Note not Due Giving New Note in Substitution—Promise of Payee to Return First Note.

Defendant in June, 1919, in payment for a car endorsed to plaintiff a promissory note to defendant dated June 19, 1917, for $350 with interest at seven per cent payable six months after date. Plaintiff objected that the note was not on an ordinary form and defendant promised to get another. Subsequently plaintiff induced defendant to make a new note to him for $350 dated September 24, 1917, payable 10 days after date with interest at eight per cent. Plaintiff promised to return to defendant the first note but (although apparently willing) omitted to do so.

Held There was valuable consideration for the second note. *Bank of British North America v. McComb*, 21 Man. R. 58, 18 W.L.R. 94, held not applicable.

ARGUED: 15th July, 1919.

DECIDED: 12th August, 1919.

APPEAL by defendant from a judgment by Barrett, C.C.J. in an action upon a promissory note. Appeal dismissed with costs. Statement.

P. C. Locke, for defendant, appellant.

F. M. Burbidge, K.C., for plaintiff, respondent.

PERDUE, C.J.M.—In June, 1917, the defendant desired to purchase a second-hand motor car from the plaintiff by giving him a note of one Ryder for $350, dated June 19, 1917, payable to the order of defendant six months after date with interest at seven per cent per annum. The plaintiff agreed to take the note in payment for the car and the defendant indorsed the note and delivered it to the plaintiff. There was no restriction on the indorsement and the defendant became liable to the plaintiff as indorser of the note. The car was thereupon delivered to the defendant. At the time the transaction took place the plaintiff raised an objection that the note was not on an ordinary note form but was written on a piece of letter paper. The note appears to have been quite regular so far as form, signature and other requisites are concerned. I notice, however, that there is no place of payment mentioned in the note. The maker is a farmer living at McCreary, a considerable distance from Neepawa where plaintiff resides.

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The trouble and expense of presenting and protesting the note in case of dishonour may have had something to do with the plaintiff's subsequent conduct. The County Court Judge has not given a written judgment but as he has given a verdict for the plaintiff we must assume that he has found all material questions of fact in the plaintiff's favour.

The defendant admits that at the time of the transaction the plaintiff took the above-mentioned objection to the note and that he, the defendant, promised to get a new note from the maker. On August 2, 1917, the plaintiff wrote to the defendant reminding him of his promise to get a proper note and he enclosed a form of note bearing the same date and being similar in other respects to the note indorsed by the defendant to the plaintiff, except that it was payable at the Merchants Bank of Canada at Neepawa. The defendant did not procure the signature of Ryder to this note. On September 24, plaintiff came to defendant and complained that the new note had not been procured. The plaintiff then induced the defendant to sign the note upon which this action was brought. It is a note, dated September 24, 1917, for $350, payable to the plaintiff ten days after date with interest at eight per cent per annum. Defendant states that plaintiff when he received this note promised to return the Ryder note but did not do so. The Ryder note, however, was kept in plaintiff's control and was produced and fyled in Court. The plaintiff says that the defendant could have had it at any time.

The defence is that there was no consideration to support the note sued on. After careful consideration I have come to the conclusion that the defence fails. When the contract for the purchase of the car was made the defendant as a part of the consideration promised to procure a new note from Ryder in the form required and to indorse it and send it to the plaintiff in lieu of the original note handed to them at the time he delivered the car. This promise the defendant failed to fulfil and the breach constituted a liability on the part of the defendant sufficient to furnish a valuable consideration for the note of September 24, under sec. 53 of *The Bills of Exchange Act*, R.S.C., 1906, ch. 119. Or, viewing the transaction from another standpoint, the promise to return the Ryder note to the

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defendant was a consideration sufficient to support the making and delivery of the new note: *Haigh v. Brooks,* 3 P. & D. 452, 10 A. & E. 309; *Wilton v. Eaton,* 127 Mass. 174; *Coggins v. Murphy,* 121 Mass. 166; 4 *Am. & Eng. Encyc.* 188; 8 *Corpus Juris* 217.

The case of *Bank of British North America v. McComb,* 21 Man. R. 58, 18 W.L.R. 94, is not applicable to the facts of this case.

The appeal must be dismissed with costs.

CAMERON, J.A.—This is a County Court action brought on a promisory note for $350, dated September 24, 1917, payable ten days after date, with interest at eight per cent. The plaintiff sold to the defendant a motor, and in payment therefor the defendant gave him the promissory note of one W. Ryder, made in his, the defendant's favour, dated June 19, 1917, for $350, with interest at seven per cent, payable six months after date. The plaintiff objected to receiving this last-named note on account of its being written on note paper. The defendant in his evidence said they would go up to Ryder and get a new note, and that the plaintiff said, "He would get it some time and send it to me" (pp. 2 & 3). Defendant asserted that Ryder was good and would pay (p. 6.). The plaintiff accordingly accepted the note. Afterwards on August 2, he sent a letter to the defendant enclosing what he deemed to be a note in proper form. He asked in this letter that the note be signed and returned to the bank and added: "Your old one will be duly forwarded"; and in this he was repeating what had been said by him at the time of the original transaction. Subsequently he discovered that Ryder was not financially good, and he stated this to the defendant who signed the note in question. The trial Judge entered judgment for the plaintiff and this appeal is from that judgment.

The question is whether, the original note being still current, there was consideration for the note sued on which was substituted for it. On this point *Bank of British North America v. McComb,* 21 Man. R. 58, 18 W.L.R. 94, was relied on. But in this case it seems to me that there is to be found sufficient consideration for the giving of the note in

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question. The defendant made certain representations as to Ryder's financial standing, which the plaintiff discovered to be unfounded. He said:

> I told him and said I had discovered that this man Ryder was not any good financially and said he would have to give me his own note on a short time note. [p. 14.]

He also added that before the signing of the note he said he would have nothing to do with Ryder, and the defendant accordingly gave him the note. This appears to me ample consideration to support the note.

As stated above the plaintiff had, at the time of the transaction of the sale, objected to the form of the original note, and subsequently forwarded a new note in the proper form offering to return the original. The defendant himself says he signed the note because he (the defendant) had agreed to do so (p. 4). And the defendant further says in answer to the question when the plaintiff told him he wanted a new note what was said about the old note: "He said it would be returned. He repeated that three or four times to me in the office." There can surely be no doubt that the promise to return the old note on the part of the plaintiff and the promise to give a new note on the part of the defendant are mutual, each a sufficient consideration for the other. Or, looked at in another light, and viewing the transaction as a whole, the promise to give a new note was part of it and is supported by the same underlying consideration.

In view of the foregoing, I do not need to enter on the consideration of what constitutes an antecedent debt or liability under sec. 53 of *The Bills of Exchange Act.* The words "or liability" were added to the English bill in committee, and they perhaps extend the previous law. *Chalmers*, p. 89. *Mr. Falconbridge* in his work on *Banking and Bills of Exchange* points out that these words appear to have been overlooked in *Canadian Bank of Commerce v. Wait,* 1 Alta. L.R. 68, 7 W.L.R. 255.

I think the appeal must be dismissed.

HAGGART, J.A.—It was contended by the defendant that there was no consideration for the giving of the note sued on,

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HAGGART, J.A.

and that the bank and plaintiff were not holders in due course. I cannot say there was no consideration. I look upon the deal from the time the bargaining began in June, 1917, until it was consummated on September 24, 1917, by the giving of the note sued on as one transaction. It was contemplated from the first that there might be required a note given on such a form as the bank would ask for. The defendant in his evidence at the trial when asked concerning the giving of this note answered:

Q. He [the plaintiff] represented this as a Merchants Bank of Canada form? A. Yes.

Q. You signed it? A. Yes, I had agreed to.

It is true both notes represented the same indebtedness and the payment of either would be the satisfaction of both as far as this defendant Carswell was concerned.

I do not think the case relied upon by the defendant, *Bank of British North America v. McComb*, 21 Man. R. 58, 18 W.L.R. 94, applies to the facts set out in this case.

I would affirm the judgment of Judge Barrett.

FULLERTON, J.A. concurs.

Appeal dismissed with costs.

KING'S BENCH CHAMBERS

REX V. ALAMAZOFF

Immigration — The Immigration Act — Proceedings for Deportation of Alien—Not Criminal Proceedings—No Jurisdiction in Court to Grant Bail—The Habeas Corpus Act, 31 Car. II., Ch. 2.

Proceedings under *The Immigration Act* for the deportation of an undesirable alien are in no sense criminal proceedings and a person arrested and detained for such purpose is not "committed for any crime" within the meaning of *The Habeas Corpus Act*, 31 Car. II., ch. 2; and cannot have recourse to that Act for the purpose of obtaining his release on bail; nor is there any jurisdiction in the Court under any other Statute or at common law to admit such person to bail.

ARGUED: 2nd August, 1919.

DECIDED: 11th August, 1919.

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Judgment.

MATHERS, C.J.K.B.

APPLICATION by a non-naturalized Russian subject who came to Canada in 1913 for bail pending an inquiry under *The Immigration Act*, 9 & 10 Edw. VII., ch. 27, with a view to his deportation. Writ of *habeas corpus* (granted for purpose of application for bail) quashed.

Marcus Hyman, for applicant.

F. M. Burbidge, K.C., for respondent.

MATHERS, C.J.K.B.:—This is an application by Solomon Pearl Alamazoff a non-naturalized Russian subject who came to Canada in 1913, for bail pending an inquiry under *The Immigration Act*, 9 & 10 Edw. VII., ch. 27, with a view to his deportation. He is at present detained at the Winnipeg immigration station by order of the Minister of Immigration upon a complaint that he with others by word or act created, or attempted to create, a riot or public disorder in Canada and did, without lawful authority, assume powers of government in the city of Winnipeg. The purpose of his detention is that an examination and investigation into the facts alleged in the complaint may be made by a Board of Inquiry. The authority for the proceedings taken is to be found in secs. 41 and 42 of the Act. Subsec. 2 of the latter section provides that if the Board of Inquiry is satisfied that the subject of the inquiry belongs to any of the prohibited or undesirable classes mentioned in secs. 40 and 41 such person shall be deported forthwith as provided in sec. 33 of the Act, subject to a right of appeal to the Minister.

Alamazoff was taken into custody on June 17 last. On July 16, a Board of Inquiry commenced an investigation into the facts alleged in the complaint against him which investigation is still pending. Sec. 33, subsec. 11, of the Act enacts that:

> 11. Pending the final disposition of the case of any person detained or taken into custody for any cause under this Act he may be released under a bond, which bond may be in Form F. in the schedule to this Act, with security approved by the officer in charge, or may be released upon deposit of money with the officer in charge in lieu of a bond, and to an amount approved by such officer; upon condition that such person shall appear before a Board of Inquiry or officer acting as such at any port of entry named by the officer in charge, and at such time as shall be named, for examination in regard to the cause or complaint on account of which he has been detained or taken into custody.

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MATHERS, C.J.K.B.

The Board of Inquiry and the officer in charge have both refused upon application to admit the applicant to bail under this subsection or to approve of the amount of the security required.

On July 29, I granted, upon Alamazoff's petition, a writ of *habeas corpus* to bring him before a Judge of this Court in order that he might make an application for bail here. Accordingly he was produced before me in Chambers on the 5th instant when the present application was made by counsel on his behalf and opposed by counsel representing the Minister.

The application is based both on the common law and on sec. 3 of *The Habeas Corpus Act,* 31 Car. II., ch. 2.

That Act only applies where the person seeking its aid "shall be committed for any crime (unless for treason or felony) in vacation time and out of term." Counsel for the applicant argued that these deportation proceedings are criminal in their essence because there is first a charge, then an order for arrest followed, if found guilty, by a sentence of deportation. I have found no English or Canadian authority on the point, but a consideration of the purpose of *The Immigration Act* convinces me that proceedings for the deportation of an undesirable alien are in no sense criminal proceedings and that a person arrested and detained for such purpose is not "committed for any crime" within the meaning of *The Habeas Corpus Act.* The object and purpose of the proceedings is not to punish for an offence against the law of Canada. It is to ascertain whether or not the conditions upon which the alien was permitted to enter and reside in Canada have been complied with by him or whether they have been broken.

The Parliament of Canada, acting well within its rights, has prescribed the conditions upon which an alien may enter or be permitted to remain in Canada. In *Atty.-Gen. for Canada v. Cain* [1906] A.C. 542, at p. 546, 75 L.J.P.C. 81, Lord Atkinson, delivering the judgment of the Privy Council quoted with approval the following passage from *Vattel's Law of Nations,*

> One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his

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MATHERS, C.J.K.B.

presence in the State opposed to its peace, order, and good government, or to its social or material interest.

The proceedings under the Act are merely a means provided for ascertaining whether or not Alamazoff, as alleged, has failed to comply with the conditions upon the observance of which alone he is entitled to remain in Canada. That such proceedings are not criminal in their essence has been decided by so high an authority as the Supreme Court of the United States. In proceedings to deport a Chinese subject pursuant to the *Chinese Exclusion Act* the point arose as to whether or not such proceedings were criminal and in *Fong Yue Ting v. United States*, 149 U.S. 697, at p. 730, Mr. Justice Gray said that such a proceeding

> is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment in the same sense in which the word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of forcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.

This language was subsequently proved by the same Court in *Wong Wing v. United States*, 163 U.S. 228 at p. 236, and in *Chin Wah v. Colwell*, 187 Fed. 592. The same has been held with respect to deportation proceedings under the U.S. *Immigration Act, 1907*, upon which our Act was largely modelled: *Sere v. Berkshire* (1911) 185 Fed. 967. This statement of the law is to my mind quite as applicable to deportation proceedings under the Canadian Act as it was held to be to the United States Act.

It is quite apparent that the applicant cannot have recourse to *The Habeas Corpus Act* for the purpose of obtaining his release on bail because that Act applies only to the case of a person committed for a crime and does not apply to the proceedings taken against him, and there is no other statute which empowers this Court to grant bail in his case.

If there is any right to bail it must be sought elsewhere. Subsec. 11, above quoted, may be passed over because it confers power only upon the immigration officer in charge.

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If a Judge of this Court has any power to admit to bail in such a case it must be because such a power has been derived from the common law.

In support of the contention that there is jurisdiction at common law to admit the applicant to bail, *Reg. v. Spilsbury,* [1898] 2 Q.B. 615, 67 L.J.Q.B. 938, was relied upon. The applicant had been committed to prison to await his return or trial for a crime to another part of the British Dominions under *The Fugitive Offenders Act, 1881.* He applied to be admitted to bail while awaiting his return. It was contended that the Act gave no power to admit to bail, but the Court in that case said: "This Court has, independently of statute, by the common law, jurisdiction to admit to bail." Then follows a passage from *Chitty's Criminal Law* in which it is said the law is well stated. This passage plainly refers to the common-law powers of the Court to admit to bail persons in custody upon a criminal charge. That the Spilsbury decision was not intended as a declaration of the law applicable to all cases is shown by the statement of Wright, J., that it is not to be taken as a precedent in a case under *The Extradition Act.* In *Wright v. Henkel,* 190 U.S. 40, the Spilsbury case was relied upon as showing the right at common law to grant bail in an extradition case. Bail has been refused in the Court below and in that conclusion the Supreme Court concurred. With respect to the power of the Court apart from statute to grant bail in such a case it merely made the cautious observation that

> We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute or that * * * * those courts may not in any case, and whatever the special circumstances, extend that relief.

In applications under both *The Fugitive Offenders Act, 1881,* and *The Extradition Acts* the party is charged with a crime, not of course a crime against the law of the jurisdiction where the proceedings are being taken, but against the law of the demanding state. It must appear that the acts alleged would constitute a crime charged within the local jurisdiction if committed there, and the object of the proceedings is that he be sent back to stand his trial before the tribunals of the de-

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manding statute. The whole proceeding is essentially criminal and the accused while under detention is in custody upon a criminal charge.

I have been referred to no English or Canadian authority, nor have I found any, which says that the Court has inherent jurisdiction to grant bail on *habeas corpus* in a non-criminal proceeding such as this is. The question has, however, been before the United States Courts in analogous deportation proceedings under the *Chinese Exclusion Acts*, and the United States *Immigration Act, 1907*. Under these Acts the deportee has a right to appeal to the Federal District Court against the deportation order, and in a number of cases it has been held that the Court to which such an appeal is made has inherent power to admit to bail as incident to its jurisdiction to hear and determine the right to make the order. *Wentfield v. Hanges*, 222 Fed. 745. In *In re Ah Tai* (1903) 125 Fed. 795, it was so held but the Court at the same time expressly disclaimed power to admit to bail on *habeas corpus* proceedings. In *Chin Wah v. Colwell, supra*, the circuit Court of Appeal for Oregon held that the power did not exist even in that case, and that the Court had no inherent jurisdiction to admit to bail.

The consensus of judicial opinion in the United States is that a Court not seized of the inquiry has no inherent jurisdiction to admit to bail an alien detained in custody under either of the above-mentioned Acts for the purpose of deportation proceedings. *In re Ah May*, 21 Fed. 808; *In re Ah Tai, supra; Chin Wah v. Colwell, supra; United States, ex rel Ng Hen v. Sisson* (1914) 220 Fed. 538.

As against this view of the law I have discovered only one decision, that of a single Judge in *In re Lum Pay*, 128 Fed. 974, and the dissenting judgment in *In re Ah May, supra*.

The Act has provided for bail being granted pending the inquiry by the immigration officer. It has not expressly conferred any jurisdiction in that respect upon this Court and, in my opinion, there is no inherent power in this Court to interfere.

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MATHERS, C.J.K.B.

But even if I had the power I should refuse to exercise it in the applicant's favour. Bail has been refused by the officer in charge and no case has been made for overruling the discretion he has exercised. The applicant is alleged to have been guilty of a very serious offence against the peace, order and good government of Canada. The offence alleged against him is one that is carried on in secret and if at liberty there can be no assurance that he would not continue to abuse the privilege of residence here. The liberty of the individual must at all times be subordinated to the safety of the state. His somewhat truculent attitude while before the Board and his refusal to answer relevant questions put to him even when assured that his answers would not be used against him in any other proceedings does not impress me favourably. For these reasons I would, even if I had the discretion, refuse to admit the applicant to bail.

The writ of *habeas corpus* will be quashed.

Writ of habeas corpus quashed.

COURT OF APPEAL

REX V. HILDEBRAND

REX V. DOERKSEN

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

Constitutional Law—Education—The School Attendance Act, Ch. 97 of 1916, Man.—Mennonites—Dom. Order in Council, Aug. 13, 1873—The Manitoba Act, S. 22—Sole Jurisdiction in the Province as to Education.

The School Attendance Act, ch. 97 of 1916 Man., was *intra vires* and is binding on a Mennonite who came to Manitoba in or about 1874 with his parents who were members of the community of Mennonites referred to in the order in council (Dom.) passed Aug. 13, 1873. In so far as said order in council may purport to bind the province in educational matters it is ineffective owing to sec. 22 of *The Manitoba Act* which gives jurisdiction therein to the provincial Legislature alone.

ARGUED: 5th August, 1919.

DECIDED: 12th August, 1919.

Statement.

STATED CASE by Charles C. Milne, police magistrate, the accused having been convicted of unlawfully neglecting to cause

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CAMERON, J.A.

his child to attend some public school as provided by *The School Attendance Act,* 6 Geo. V., ch. 97. Conviction affirmed.

A. E. Hoskin, K.C. and *J. T. Haig,* for appellants.

H. J. Symington, K. C. and *A. C. Campbell,* for Attorney-General for Manitoba and Police Magistrate.

The judgment of the Court was delivered by

CAMERON, J.A.—The accused John Hildebrand was on July 17, 1919, convicted by Charles C. Milne, a police magistrate for the province, for having on June 2, 1919, at the Houston school district in Manitoba, unlawfully neglected to cause his child named Maggie, who was over the age of seven years and under the age of 14 years, to attend some public school as provided by *The School Attendance Act,* 6 Geo. V., ch. 97. The accused moved for an order *nisi* for a writ of *certiorari* to remove the conviction into this Court to quash the same and upon the motion it was agreed to dispose of the whole matter. In accordance with sec. 31 of the Act the magistrate stated a case, which is as follows:

The following is a statement of the case in this matter submitted by me, Charles C. Milne, one of His Majesty's Police Magistrates in and for the Province of Manitoba, for the opinion of the Court of Appeal for the Province of Manitoba.

On the 16th day of June, A.D. 1919, at the Village of Altona, in the Province of Manitoba, John Hildebrand, was charged before me in that he did on the 2nd day of June, 1919, at Houston School District, in Manitoba, having on the 27th day of May, 1919, been notified with respect to his child Maggie in the form of Schedule "A" to *The School Attendance Act* and amendments thereto, and being the parent of and having legal charge or control of such child, namely, Maggie, residing at Houston School District did unlawfully neglect to cause such child, being a person over the age of seven and under the age of fourteen years, to attend some Public School as provided under *The Public Schools Act* or to make satisfactory provisions for the education of such child, the said child not having been excused from such attendance by *The School Attendance Act.*

On the charge being read to the accused he pleaded not guilty and the trial was proceeded with at the city of Winnipeg on the 16th day of July, A.D. 1919, and upon the conclusion of the evidence for the prosecution and for the accused, the counsel for the accused raised the objection that the government of the province of Manitoba had no power to pass *The Act respecting School Attendance,* being Chapter 97 of the Statutes of Manitoba 1916, and that if the said Government did have power to pass said Act, that it was ineffective in so far as the accused, John Hildebrand,

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a Mennonite who came to this country in or about 1874 with his parents who were members of the original Mennonite colony, and that the Government of the Province of Manitoba had no power to legislate as to schools, school attendance or education in so far as the accused or any Mennonite coming from that part of Russia referred to in the evidence was concerned, and after hearing argument and being of the opinion that the said Government of the Province of Manitoba had power to pass said Act I found the accused guilty and adjudged said accused for his said offence to forfeit and pay the sum of $5.00, to be paid and applied according to law, and also to pay the sum of $8.85 costs, and if the said several sums were not paid before 10 o'clock in the forenoon of the 23rd day of July, A.D. 1919, I adjudged the said accused, John Hildebrand, to be imprisoned in the common gaol of the Eastern Judicial District at Winnipeg for the term of twenty days unless the said sum and the costs and charges of the commitment and of the conveying of the said John Hildebrand to the said common gaol were sooner paid.

The evidence, which was taken herein by Court Stenographers, along with the exhibits, information and conviction, are submitted as part of this case.

As requested by counsel for the accused I now state the following questions for the consideration of the Court.

(1) Had the Government of the Province of Manitoba the power to pass *The School Attendance Act* being Chapter 97 of the Statutes of Manitoba, 1916?

(2) If the Government of the Province of Manitoba had power to pass the said Act is it binding upon the accused, John Hildebrand, a Mennonite who came to this country in or about 1874 with his parents who were members of the community referred to in the exhibits filed in the case?

(3) Had the Government of the Province of Manitoba power to legislate as to schools, school attendance or education in so far as the accused or any Mennonite coming from that part of Russia referred to in the evidence was concerned?

Dated this 17th day of July, A.D. 1919, at the Town of Morden, in the Province of Manitoba.

[Sgd.] C. C. Milne,
Police Magistrate.

The case against Doerksen is substantially the same as that against Hildebrand, except that it appears that the latter was born in Russia and came to this province as a child in 1874. The former was born in this country. This distinction has no significance.

Evidence was taken at length before the magistrate and the whole case for the accused hinges on the documents filed as exhibits.

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An account of the Mennonites and of the causes of their migration from Russia to Canada is to be found in the copy of the report of the Minister of Agriculture for the year 1873 filed as Ex. 11. The German Mennonites of Russia left Prussia because of their objections to military service and in 1786 were invited by Catharine II. to settle in Russia with the understanding that they were to be free from military service, that they were to be allowed to educate their children in the German language, and suffered to make use of affirmation instead of the oath in the Courts.

[According to the doctrines of their religious leader Menno. (1492-1559)] oaths and the taking of life were absolutely forbidden; hence the magistracy and the army were for the Mennonite unlawful callings; but magistrates were to be obeyed in all things not prohibited by Scripture. [*Encyc. Brit.*, Art. Menno].

There is a similarity between the doctrines of this denomination and those of the Quakers and we find that their first settlement on this continent was made in 1783 at Germantown near Philadelphia. In 1786 their first migration to Canada occurred, and the Mr. J. Y. Shantz, Dominion immigration agent mentioned in the report of the Minister of Agriculture, was, no doubt, a descendent of one of these immigrants.

The German Mennonites settled near the Sea of Azof and lived undisturbed in that region until a few years prior to 1872, when the Czar threatened to withdraw their privileges, refused to exempt them from army service and issued a decree rtquiring them to have their children instructed in the Russian language. They made inquiry through the British Consul at Berdiansk asking him whether if they emigrated to Canada they would be free from military service and from the ordinary form of oath. The Consul wrote to the Secretary of State for the Colonies, who in turn communicated with the Canadian government, which invited delegates from the Mennonites to visit Canada and, after several visits, a district in the southeastern part of this province, comprising eight townships, was set aside for their settlement.

On July 23, 1873, a letter was written to the four "Mennonite Delegates from Southern Russia" by John Lowe, secretary of the Department of Agriculture, in which the various

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privileges and advantages to be accorded the German Mennonites were set forth, including the exemption from bearing arms, the lands set aside for their occupation, and their religious and educational rights which are to be found in this paragraph of his letter:

10. The fullest privilege of exercising their religious principles is by law afforded to the Mennonites, without any kind of molestation or restriction whatsoever; and the same privilege extends to the education of their children in schools.

In an order in council, passed, on the recommendation of the Minister of Agriculture, on August 13, 1873, the arrangement made with the Mennonite delegates is set forth with particularity. They are promised "an entire exemption from military service as is provided by law and order in council." The land reservation is again described and the privilege of exchanging it for other lands is recognized. The clause respecting religion and education reads as follows:

10th. That the Mennonites will have the fullest privilege of exercising their religious principles, and educating their children in schools, as provided by law, without any kind of molestation or restriction whatever.

Now this paragraph differs somewhat from that relating to the same matters in Mr. Lowe's letter. The last-quoted paragraph, so far as the subject-matter of education is concerned, clearly provides for the education of the Mennonite children in schools "as provided by law," which words are not to be found in Mr. Lowe's letter. What it means is that the Mennonites are to have the unhampered and unrestricted privilege of educating their children in the schools provided by the laws of the country in which they proposed to settle. In my judgment, this undertaking is in no wise interfered with by the compulsory provisions of the Act in question and we are left to conjecture what the real motive may be that underlies the opposition to that beneficial legislation.

Assuming, however, that the antagonism of the Act is based on conscientious convictions that our school law is at variance with the promise in Mr. Lowe's letter, or, rather, with the quoted paragraph in the order in council, in which Mr. Lowe's letter must be taken as merged, what is the position? This province came into being in May 12, 1870, by virtue of *The*

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Manitoba Act, ch. 3, 33 Vict., confirmed by the Imperial Act, ch. 28, 34 & 35 Vict. By sec. 22 of that Act it is provided that "In and for the Province, the said Legislature may exclusively make laws in relation to Education." Nothing can be plainer. The Dominion Parliament itself could and can pass no legislation affecting education in this province, save in the circumstances indicated in subsecs. 2 and 3 of sec. 22, which have absolutely no application here. And if that cannot be done by a statute of Canada how is it possible that it could be accomplished by an order of the Governor-General in Council or by the letter of an official of a department of the Dominion Government? Counsel for the applicants urged that the authority may be found in the statutes passed subsequently to Confederation establishing the Department of Agriculture (which for some time had control of matters relating to immigration) under the authority of sec. 95 of *The B.N.A. Act*. But it is impossible to read those statutory provisions as conferring upon the department authority to bind or affect the province in educational matters, jurisdiction as to which is given the provincial Legislature alone by sec. 22 of *The Manitoba Act*. I can see no ground whatever for sustaining this contention and, in my opinion, the two applications must be refused. In each case I would answer the first question "Yes," the second "It is," and the third "It had and has."

Conviction affirmed.

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COURT OF APPEAL. CHAMBERS 1919

IN RE THE PUBLIC UTILITIES ACT

WINNIPEG ELECTRIC RAILWAY COMPANY'S CASE

Public Utilities Commission—Appeal Therefrom—Leave Refused—Decision Not "Final"—Purpose to Test Constitutional Validity of Act—Appeal Not Proper Proceeding.

Application for leave to appeal against an order made by the Public Utilities Commissioner was refused because the order desired to be appealed from was not final; and because the main purpose of the appeal was to test the constitutional validity of *The Public Utilities Act* or the part of it relating to the appointment of the Commissioner, and leave for this purpose should not be given in view of the great number of decisions by the commission and as the proper proceeding for such purpose is by *quo warranto* information (*Re Toronto Railway Co. and City of Toronto*, 44 O.L.R. 381, referred to); also the power of the Commissioner to make the order complained of could be more properly dealt with in an action now pending.

ARGUED: 17th October, 1919.

DECIDED: 20th October, 1919.

Statement.

APPLICATION on behalf of the city of Winnipeg for leave to appeal against an order made by the Public Utilities Commissioner granting an increase in the fares chargeable on the Winnipeg Electric Railway. Application dismissed.

T. A. Hunt, K.C. and *J. Preudhomme,* for city.

E. Anderson, K.C., for Winnipeg Electric Railway Company.

PERDUE, C.J.M.—This is an application on behalf of the city of Winnipeg for leave to appeal against an order made by the Public Utilities Commissioner granting an increase in the fares chargeable on the Winnipeg Electric Railway.

The main ground taken upon this application is that *The Public Utilities Act,* R.S.M., 1913, ch. 166, or the part of it relating to the appointment of the Public Utilities Commissioner, is beyond the powers of the provincial Legislature to enact. This point was before the Court of Appeal in 1916 and the judgments delivered by the several members of the Court are reported in vol. 26 of *The Manitoba Reports,* beginning at p. 584, and in [1917] 1 W.W.R. 9. In that case the Court divided equally upon the question whether the constitutional validity of the Act was properly before the Court on the ap-

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peal. The result was that the appeal to the Court was dismissed. Leave to appeal to the Privy Council was granted, but the appeal has never been argued. In the meantime the Public Utilities Commissioner has been exercising the powers purporting to have been conferred upon him under the Act and his orders and rulings have been obeyed hitherto, in so far as I am informed.

In the 1916 application the constitutional question was raised by the Winnipeg Electric Railway Company, and counsel for the company argued that the Act was *ultra vires* of the provincial Legislature. Counsel for the city of Winnipeg, on the other hand, sought to uphold the validity of the Act.

The only provision in the Act allowing an appeal is contained in sec. 70. That section is as follows:

70. An appeal shall lie to the Court of Appeal, in conformity with the rules governing appeals to that court from the Court of King's Bench or a judge thereof, from any final decision of the commission upon any question involving the jurisdiction of the commission but such appeal can be taken only by permission of a judge of the Court of Appeal given upon a petition presented to him within fifteen days from the rendering of the decision, notice of which petition must be given to the parties and to the commission within said fifteen days. The costs of such application shall be in the discretion of the said judge.

Under the section there can only be an appeal from a final decision of the commission. The order from which the city desires to appeal is not final. The order commences with the recital: "Upon the application of the Winnipeg Electric Railway Company for a further temporary increase in fares to meet increased wages." The written judgment of the Commissioner states that the application is a special one "made during the pendency of a major application by the company for a permanent increase in fares." He then goes on to say that the

major application involved an elaborate investigation into the affairs of the Company and will not reach a determination probably until the end of the year. Meantime expenditures in wages over and above what have to be provided under the existing scale will have to be met and the Company claims that it is without the means to meet these increases without additional revenue.

The Commissioner also refers to the fact that the application then before him was analogous to a special application made

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PERDUE, C.J.M.

by the company for an emergency increase in the price of gas in July, 1917.

In the case before this Court in 1916, to which I have above referred, the order of the Commsisioner from which the appeal was brought was of a distinctly final character. It ordered the company amongst other things, to so construct and maintain its railway tracks and other parts of its system that a certain result might be attained in regard to the central station, with the object of lessening the danger of electrolysis.

The question of the constitutional validity of *The Ontario Railway and Municipal Board Act* recently came up for consideration before the Appellate Division in *Re Toronto Railway Co. and City of Toronto,* 44 O.L.R. 381, 15 O.W.N. 244. The question was raised on an appeal from an order made by the Board. Meredith, C.J.O. expressed the following opinion:

There is, however, an insuperable difficulty in the way of the appellants' success on this branch of the case.

That is not open to attack, in a collateral proceeding, the status of a *de facto* Judge having at least a colourable title to the office, and that his acts are valid, is clear, I think, on principle and on authority, and it is also clear that the proper proceeding to question his right to the office is by *quo warranto* information.

This opinion was concurred in by all the members of the Court.

The Public Utilities Act has been in force since 1912 and the Commission has had under its consideration a great number of important matters upon which it has adjudicated and in respect of which its decisions have been regarded as binding and have been carried out by the parties affected. In these circumstances, and in view of the above decisions, I do not think that leave to appeal for the purpose of testing the constitutional validity of the Act should be granted.

The question as to the power of the Public Utilities Commissioner to increase the rates chargeable by the Winnipeg Electric Railway Company for the carriage of passengers over its lines is one which can more properly be dealt with at the trial of the action now pending, in which the city of Winnipeg is applying for an injunction against the company to restrain it from charging the fares set out in the order made by the

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Commissioner. I do not think that I should on this application express any opinion which might have the effect of embarrassing the Judge on the trial of that action.

The application for leave to appeal was dismissed. I make no order as to costs.

Application dismissed with costs.

COURT OF APPEAL

IN RE RICHARDSON ESTATE

Before PERDUE, C.J.M., CAMERON, HAGGART and FULLERTON, JJ.A.

Insurance—Constitutional Law—Benevolent and Fraternal Associations—Endowment Certificate in Independent Order of Foresters—Whether Beneficiary Changed by Bequest of Will.

A testator had taken out an endowment certificate of the Independent Order of Foresters, his wife being designated as beneficiary. He then lived in Saskatchewan. The certificate purported to be executed at Toronto, the headquarters of the society. Later, at the dates of his will and of his death, he lived in Manitoba. By his will he left to his executors on certain trusts (in favour of his housekeeper and for purposes in the discretion of his executors) all his residuary estate "including * * life insurance or the proceeds of any policy of insurance."

Held (reversing judgment of Macdonald, J.; Cameron, J.A. dissenting) the bequest in the will did not deprive the wife of her right to the insurance money as beneficiary under the policy.

Per Perdue, C.J.M.: It was not shown that the law of Manitoba applied. The contract of insurance was made either under the law of Saskatchewan or Ontario and, under the law of either, a trust was created which the insured could not destroy. The change in beneficiary must be effected in accordance with the law of the province governing the contract. Also the attempted change of beneficiary had not been made in accordance with the constitution and laws of the society which were declared by its Dominion Act of incorporation to govern it and there was no right of interference by provincial legislation (*John Deere Plow Co. v. Wharton* [1915] A.C. 330, and other cases referred to). Also in Manitoba the decisions for over 20 years have been that beneficiary certificates issued by benevolent or fraternal societies are subject to the rules and regulations of the society and a change of beneficiary must be made in accordance therewith; there is no provision in Manitoba similar to that in *The Ontario Insurance Act* making it applicable to benevolent societies. Also sec. 15 of *The Life Insurance Act* of Manitoba which purports to give to the insured a greatly extended power and to place life insurance for the benefit of wives and children on much the same plane as that in favour of persons wholly outside the protection theretofore given by the Act, should be construed with the rest of the Act kept in

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view, and the spirit and purpose of the original Act should be preserved as far as any reasonable construction of the section will permit; and when mention of a will is found in secs. 7 and 8 and not in sec. 15 it may be held that the omission of the word in sec. 15 was intentional and that the revocation was not intended to be made by will. Even if the expression "instrument in writing" as used in sec. 15 includes a will the words of the will in question did not sufficiently identify the policy "by its number or otherwise" as required under that section.

Per Cameron, J.A. (dissenting): Under the constitution and laws of the Society the person to whom the moneys under the certificate were to be paid was intended to be determined by the laws of the province where the member at his death had his fixed place of abode. The effect of *The Manitoba Insurance Act* is that Dominion companies receiving a Manitoba license attorn and subject themselves to the laws of Manitoba. Sec. 47 of that Act applies to life policies whenever issued by a company licensed to do business in Manitoba and makes them payable in Manitoba. Such Dominion companies and their policies are therefore subject to the provisions of *The Life Insurance Act*. The endowment certificate was "a policy of insurance" and within sec. 15. That Act overrides the rules and regulations of the society. The endowment certificate was sufficiently identified and the will was effective as an instrument in writing and the insured had thereby exercised his statutory power in accordance with the provisions of the Act.

Per Haggart, J.A.: The bequest was not an assignment of the insurance moneys such as was contemplated by the legislature even under said sec. 15.

Per Fullerton, J.A.: The rights of the parties in respect of the effect of the attempted revocation are governed by the laws of either Ontario or Saskatchewan and under both *The Ontario Insurance Act* and *The Saskatchewan Insurance Act* the bequest in the will so far as it affects the certificate in question is invalid.

ARGUED: 25th June, 1919.

DECIDED: 14th October, 1919.

Statement.

APPEAL from judgment of Macdonald, J. on a special case who held that a bequest in a will was effective to divert the payment of the moneys on an endowment certificate in the Independent Order of Foresters from the testator's wife, the beneficiary designated in the certificate. Appeal allowed, Cameron, J.A., dissenting.

W. F. Hull and *F. W. Sparling*, for Mrs. Richardson.

J. F. Davidson, for executor.

PERDUE, C.J.M.—This is a special case stated for the opinion of the Court of King's Bench under sec. 42 of *The Manitoba Trustee Act*, R.S.M., 1913, ch. 200. On April 6, 1915, an endowment certificate was issued by the Supreme Court of

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the Independent Order of Foresters by which the Order agreed to pay to the widow, or other beneficiary designated on the certificate, or to the personal representatives of Hugh Richardson, $2,000. The certificate contained other covenants entitling the insured to an annuity, when he should attain the age of 70 years, and to a payment of $1,000 in case of total and permanent disability, but neither of these two latter covenants comes in question.

Richardson, in accordance with the constitution and laws of the Order, designated his wife Bessie (Elizabeth) as the beneficiary of the insurance by an instrument in writing attached to the endowment certificate. Both Richardson and his wife were at the time of the issue of the certificate and the designation of the beneficiary residents of Battleford in the then North-West Territories.

Richardson died on February 7, 1916, leaving a will dated January 18, 1915, by which after certain bequests he bequeathed to his executors on certain trusts all his residuary estate including "life insurance or the proceeds of any policy of insurance." One of the trusts is that one-half of such residuary estate should be paid to his housekeeper, Florence Besley. His wife claims the insurance money as the duly designated beneficiary. The Independent Order of Foresters have paid the insurance money into Court and the special case was stated for the opinion, advice and direction of the Court.

The following are the questions submitted:

First: Whether the proceeds of the said Endowment Certificate or Policy, being the moneys now paid into Court, pass and become payable out to the Executors under and by virtue of the said Will, or are they payable to the said Elizabeth Richardson as beneficiary named therein?

Second: Whether the said Florence Campbell nee Besley is entitled to any interest in the said proceeds of the said Endowment Certificate or Policy, or moneys now in Court, if so, what share?

Third: If it should be found that the said Beneficiary Elizabeth Richardson, is legally entitled to the said moneys or proceeds, whether the amount of the said assessment or interest and costs should be paid out of the said Testator's estate to the said Elizabeth Richardson?

The case was heard by Macdonald, J., who directed that the proceeds of the endowment certificate should be paid to the executors and form part of the estate of the deceased for the

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purpose of distribution in accordance with the provisions of the will. From this decision the present appeal is brought.

The Supreme Court of the Independent Order of Foresters was originally incorporated under R.S.O. 1877, ch. 167, but afterwards received incorporation under Dominion statute, ch. 104 of 1889, amended by ch. 51 of 1896, and ch. 100 of 1901. By 3 & 4 Geo. V., ch. 113, (1919) the acts of incorporation were consolidated and amended and the name was changed to the "Independent Order of Foresters," which I shall refer to as the society or the Order. By sec. 3 of the consolidating Act it is declared that the constitution and laws of the society filed in the office of the superintendent of insurance on January 26, 1909, as amended by the amendments filed in the same office on September 30, 1911, are the existing constitution and laws of the society, and, subject to the provisions of sec. 11 of the Act (which does not affect the matters in question on this appeal), are binding upon the society and every member thereof until repealed, altered or amended as provided by the constitution and laws. A printed copy of the constitution and laws of the society has been put in as part of the material.

The objects of the Order or society are fraternal and benevolent, one of its purposes being to give such aid and benefits to its members and those dependent on them as may be provided in the constitution and laws. One of these benefits is insurance in favour of the beneficiaries of a member: Constitution, sec. 4. See also the purposes and objects of the Order as declared and set out in ch. 104 of the Act of 1889.

By sec. 10 of the Act of 1913 it is declared that the insurance powers of the society shall be exercised in conformity with the provisions of the Act and in conformity with the provisions of *The Insurance Act, 1910,* ch. 32, applicable to the society, but is to be subject to future legislation by Parliament respecting insurance powers of fraternal societies.

By sec. 9 the society shall be entitled to receive a license under *The Insurance Act, 1910,* renewable from year to year so long as the society complies with the provisions of that Act, applicable to the society, to undertake with its members the contracts of life, disability and sickness insurance specified

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in the constitution and laws of the society. The Act of 1913 continues the society as a body corporate, subject to its existing constitution and laws, and although it makes certain provisions of *The Insurance Act, 1910,* applicable to the society, still the society remains a fraternal organization which confines its objects and benefits to its own members.

By sec. 4, subsec. (4), of the constitution and laws of the society, provision is made for the payment to the beneficiaries of a member in good standing at the time of his decease of an insurance or mortuary benefit to the amount carried by the member.

Subsec. (5) of sec. 4 is as follows:

(5) The Insurance or Mortuary Benefit of a member shall be paid to the member himself, or to the wife or husband of, or to the affianced wife of, or to the affianced husband of, or to the children of, or to the blood relations of, or to persons dependent upon, such member, who may have been designated, as provided in the Constitution and Laws, by name as the beneficiary of such member, or, subject to the approval of the Supreme Chief Ranger, to such other beneficiary as may be permitted by the laws of the province, state or country in which the member resides at the time of making the designation of the beneficiary or beneficiaries.

Sec. 150 provides the manner in which a member may change his beneficiary. Par. (a) of subsec. (1) of that section provides the procedure, namely:

By filing with his court his application for change of beneficiary on form No. 14, fully filled in, signed by himself and properly executed, setting forth fully and clearly the changes he desires to make; provided that a designation of a beneficiary not in conformity with section four, subsection five, shall be null and void from the beginning.

Sec. 160 deals with the payment of the insurance or mortuary benefit. By subsec. (3) of that section:

If a member shall have made application for change of beneficiaries in conformity with the provisions of section four, subsection five, and section 150, subsection one, and not repugnant to the laws of the Province, State or country in which the member had a fixed place of abode, the benefit may be paid *at the discretion of the Supreme Chief Ranger* to such last designated beneficiary or beneficiaries.

The contention on behalf of Florence Besley is that by sec. 15 of *The Life Insurance Act* of this province, R.S.M. 1913, ch. 99, the effect of the will was to change the beneficiary under the policy and to make the proceeds of it payable in the manner set out in the will, also that the direction in the

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ill sufficiently satisfied the requirement of sec. 15 as being an instrument in writing attached to or endorsed on the olicy or identifying the same by its number or otherwise."

The first question to consider is: Does *The Life Insurance ct* of the province of Manitoba apply to the insurance in uestion in this case? At the time the beneficiary certificate as applied for and issued, Richardson, the insured, and his ife, the beneficiary, were both residing in the province of askatchewan. The law governing the control of insurance as either that of the province of Ontario or that of the rovince of Saskatchewan. According to the decision in *Na-onal Trust Co. v. Hughes,* 14 Man. R. 41, the contract would e governed by the law of Saskatchewan, but it really makes o difference whether the law of that province or the law of ntario is applied, because in neither is there to be found any uch provision as is contained in sec. 15 of the Manitoba sta-ute. The main ground upon which it is argued that the Mani-oba law applies is that by *The Manitoba Insurance Act,* .S.M., 1913, ch. 98, sec. 47, where a company is licensed nder that Act, the moneys payable under a life-assurance olicy shall be payable in this province; that the insured hav-ng become a resident of Manitoba at the time of his death he laws of that province would govern his life insurance. ut under sec. 3 of ch. 98, that Act does not apply to a com-any licensed by the Dominion of Canada as is the Independ-nt Order of Foresters. See sec. 9 of the Act of incorpora-on, 3 & 4 Geo. V., ch. 113. In my view it has not been nown that the law of Manitoba applies in this case. The ontract was not made under the law of this province. It was ade either under the law of Saskatchewan or Ontario and, nder the law of either, a trust was created which the insured ould not destroy. The endowment certificate was lost and it oes not appear that it was ever brought to Manitoba. (See lause 6 of stated case). A mere assignment of an insurance olicy might be governed by the law of the country where the nsured was residing but it could not change the contract it-elf. See *Lee v. Abdy,* 17 Q.B.D. 309, 55 L.T. 297. The hange of beneficiary must be effected in accordance with the aw of the province governing the contract: See *Re Baeder*

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and Canadian Order of Chosen Friends, 36 O.L.R. 30, 9 O.W.N. 88, 462. This point is particularly referred to in the constitution and laws of the Order: see sec. 4, subsec. (5), above set forth, which applies the law of the province in which the member resided at the time of designating the beneficiary.

There is also the further question, can the Legislature of this province interfere with a contract of life insurance made by the Independent Order of Foresters? As already pointed out, the constitution and laws of the society are declared by the Act of incorporation to be those governing the society and are further declared by the Act to be binding on the society and every member thereof. Unless the Manitoba statute qualifies the Dominion Act of incorporation the only way in which a change of beneficiary could be made in an endowment certificate is that provided in the constitution and laws of the society. Sec. 4, subsec. (5), limits the beneficiaries of the member to the person or persons designated by him as such from amongst the relatives or dependents mentioned in the subsection. If he desires to choose a beneficiary outside the persons or classes mentioned the choice must be subject to the approval of the chief ranger. When a beneficiary is once designated and accepted by the society, the insurance or mortuary benefit becomes payable to such beneficiary unless a change of beneficiary is made in accordance with the constitution and laws. As against the beneficiary the member himself has no power of disposition over the money payable under the endowment certificate. If the Manitoba statute applies to such insurance and a member of the society is permitted to change the beneficiary as he pleases and even to divert the insurance to a stranger or his creditors as it is contended he may do under sec. 15, then the purposes and objects of the society may be frustrated and a serious change be effected in its constitution and status as a fraternal society. One of the main purposes of the society is to give aid and benefit to its members through the Insurance and Mortuary Benefit Department: Const. and laws, sec. 4. To remove the restrictions placed by the constitution and laws upon the change of beneficiaries and the application of the insurance money would be

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serious interference with the objects of the society as in-rporated by the Act of the Parliament of Canada.

In *Citizens' Insur. Co. of Canada v. Parsons*, 7 App. Cas. , 51 L.J.P.C. 11, it was held by the Privy Council that a ovincial Legislature might prescribe certain conditions to rm part of a fire-insurance policy upon property within the ovince, where the policy was issued by a company incorpor-d under Dominion authority. But it was expressly point-out in the judgment that the legislation by the province did t in the cases under consideration assume to interfere with e constitution or status of the corporation; pp. 113-114 (7 pp. Cas.). Sec. 15 of *The Life Insurance Act* would not only erfere with the contract itself, but it would seriously affect e constitution and status of the order by controlling and ridging its powers.

The powers of provincial Legislatures in regard to com-nies incorporated under the authority of the Parliament of nada, were considered in the recent decision of the Privy uncil in *John Deere Plow Co. v. Wharton* [1915] A.C. 330, L.J.P.C. 64, 7 W.W.R. 706, 29 W.L.R. 917. The *Com-nies Act* of British Columbia (R.S.B.C., 1911, ch. 39) pro-ded that companies incorporated by the Dominion Parlia-ent should be licensed or registered under that Act as a con-tion of carrying on business in the province or maintaining oceedings in the Courts. The John Deere Plow Company as incorporated under *The Companies Act* of Canada and as empowered by its charter to carry on business throughout e Dominion. The company was doing business in British olumbia without being licensed or registered. The question r determination was, whether the *Companies Act* of British olumbia was *ultra vires* of the Legislature of that province. fter holding that the Parliament of Canada had power to act the Dominion *Companies Act*, Lord Haldane, who de-ered the judgment of the Judicial Committee, said as fol-ws (7 W.W.R. at p. 716):

It is enough for present purposes to say that the province cannot legis-e so as to deprive a Dominion company of its status and powers. This es not mean that these powers can be exercised in contravention of the ws of the province restricting the rights of the public in the province nerally. What it does mean is that the status and powers of a Dom-

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inion company as such cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens' Insur. Co. of Canada v. Parsons, supra; Colonial Building and Investment Assn. v. Atty.-Gen. for Quebec,* 9 App. Cas. 157; 53 L.J.P.C. 27, and *Bank of Toronto v. Lambe,* 12 App. Cas. 575, 56 L.J.P.C. 87.

The provincial Act was held to be *ultra vires.*

The Ontario Insurance Act was made applicable to benevolent societies.: R.S.O. 1897, ch. 2, subsec. 27. There is no similar provision in the Manitoba statutes. The Ontario decisions, therefore, in respect to insurance in such societies must be considered with that distinction kept in view. In this province the decisions for over 20 years have been that beneficiary certificates issued by benevolent or fraternal societies are subject to the rules and regulations of the society issuing the certificate, and that a change of beneficiary must be made in accordance with such rules and regulations.

In *Leadlay v. McGregor,* 11 Man. R. 9, a society formed for fraternal and patriotic purposes and having a written constitution provided a bequeathment fund from which, on proof of the death of a member, a sum of money became payable to the beneficiary of the deceased member. After the issue of the "bequeathment certificate" a change was made in the laws of the society by which the money should be payable to the wife, affianced wife, relative or person dependent on the member as designated in the bequeathment certificate. By his will the member directed his life-insurance money to be paid to his executors on certain trusts. He also indorsed on the bequeathment certificate a memorandum revoking the beneficiary named in it and directing payment of the money to his executors. The officers of the order refused to recognize the change of beneficiary or the direction in the will. Killam, J. held that the member had no interest in the fund raised or to be raised, but merely a power to appoint an object to receive the same which power must be exercised in accordance with the regulations of the society. Many authorities are cited by the learned Judge in his judgment. I would add to them the later case of *Bennett v. Slater* [1899] 1 Q.B.D. 45, 68 L.J. Q.B. 45.

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When *Leadlay v. McGregor, supra*, was decided there was provision in the Manitoba statutes similar to that contain- in sec. 15 of *The Life Insurance Act*. That section first peared in ch. 17 of the statutes of 1899. The effect of sec. in the case of insurance issued by a fraternal society in our of a beneficiary came up for consideration in *In re derson's Estate*, 16 Man. R. 177, 3 W.L.R. 127. In that e the testator, who was a member of the Ancient Order of ited Workmen, a society incorporated under *An Act for Incorporation of Charitable, Benevolent and Savings As- iations*, 40 Vict., ch. 25, of Manitoba, held a certificate ued by the Order by which $2,000 was at his death to be d to the beneficiary designated by him. He had appointed wife as such beneficiary. By his will he sought to revoke appointment of his wife and to direct that the insurance ould form part of his general estate. It was held by the ll Court of Queen's Bench that the provisions of *The Life urance Act* of this province did not apply to the insurance question. The ground for the decision was that if effect re given to the attempted revocation contained in the will the urance money would become part of the general estate of deceased, which would be contrary to the constitution and neral laws of the Order. This decision was followed by thers, J. in *Re Drysdale Estate*, 18 Man. R. 644, 10 L.R. 642.

But apart from the foregoing, I regard the questions in- lved in this case as so important as to warrant a further nsideration of *The Life Insurance Act*, particularly in re- rd to the effect of sec. 15.

The subject of life insurance for the benefit of wives and ldren has been before the Legislature of the province at rious sessions from an early date. In the Consolidated Sta- es of Manitoba, 1880, there was *An Act to secure wives and ldren the benefit of life assurance*, (ch. 66). This Act abled the husband to insure his life for the benefit of his wife d children and the money payable thereunder was declared be free from the claims of creditors. In 1883, an Act, ch. , was passed, the preamble of which is as follows:

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Whereas it is expedient to encourage insurance on the lives of husbands and parents for the benefit of their wives and children and to consolidate and amend the statutes relating to the same; therefore &c.

This recital showing the policy of the Legislature was repeated in subsequent Acts and revisions until the revision of 1913 when it was omitted. The Act of 1883 gave somewhat fuller powers as to insuring and appropriating policies for the benefit of wives and children and conferred powers very similar to those contained in the later Acts. This Act appears in R.S.M., 1892, ch. 88.

A considerable change in the legislation was made by ch. 26, of the statutes of 1895. The provisions in this Act relating to appropriation and re-appropriation are similar to those found in R.S.M., 1902, ch. 83, secs. 7, 8, 9, and these have been carried into the R.S.M., 1913, ch. 99, without any change, the numbers of the sections being the same.

The Act, as it now stands, permits a man to insure his life for the benefit of his wife and children or a father or mother to insure his or her life for the benefit of his or her children (sec. 2). Whatever a man may do in respect of insurance on his life a woman may do, the provisions relating to insurance upon the life of a man shall be applied to insurance on the life of a woman (sec. 6). A policy of life insurance effected by a woman on her life and expressed to be for the benefit of her husband and children or any of them *shall be deemed a trust in favour of* the objects therein named and shall not, so long as any object of the trust remains unperformed, form a part of the estate of the deceased or be subject to her debts (sec. 5).

By sec. 7, if a policy of insurance effected by a husband on his life is expressed to be for the benefit of his wife, or of his wife and children, etc. or has been declared in manner indicated to be for her or their benefit,

such policy shall inure, and be deemed a trust, for the benefit of his wife for her separate use, and of his children or any of them, according to the intent so expressed or declared; and so long as any object of the trust remains, the money payable under the policy *shall not be subject to the control of the husband or his creditors, or form part of his estate.*

By sec. 8, the insured may, in the manner pointed out in the section, vary a policy, declaration or appropriation previously

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made and apportion the benefits anew to his wife and children or to one or some of them. He may also do the same thing by his will and if done by will the appropriation made by the will shall prevail over any other made before the date of the will.

Sec. 9 provides for the case of the death of a beneficiary during the liftime of the person insured. In that event the insured may declare the share of the deceased shall be for the benefit of such other person or persons as he may name "not being other than the wife and children of the insured or one or more of them."

When no appointment has been made sec. 11 of the Act provides the mode of division of the insurance money amongst wife, children, etc.

The effect of the above sections is that when a policy of insurance has been made or appropriated for the benefit of wife and children or wife or children or any of them, it becomes a vested trust in favour of the beneficiary or beneficiaries and the insured ceases to have any ownership in the money payable under it and it forms no part of his estate. He has, however, a power of appointment over the insurance money amongst a class of persons who are the beneficiaries of the trust and he may declare what person or persons in this class shall benefit and in what proportions. He has no power under these clauses to appoint the insurance money to any person or persons outside this class. See *Neilson v. Trusts Corpn. of Ontario*, 24 O.R. 517; *Mingeaud v. Packer*, 21 O.R. 267, 19 O.A.R. 290; *In re Cochrane*, 16 O.L.R. 328, 11 O.W.R. 956.

Sec. 15 was introduced in 1899 in the following circumstances: The Act as it stood in the Revised Statutes of 1892, ch. 88, was amended in 1895 by ch. 26 of the statutes of that year by substituting the provisions now found in secs. 7, 8 and 9 of the present Act, in the place of sec. 5 of ch. 88, R.S.M., 1892. By sec. 12 of the last-mentioned Act it was provided that the person insured might revoke the benefit of the insurance as to one or more or all of the persons intended to be benefited and to declare that the policy should be for the

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benefit only of the persons not excluded or for them and others not originally named; *but these others must be persons for whose benefit an insurance might be effected or appropriated under the provisions of the Act.* Sec. 13 provided how the revocation should be made. The Act of 1895, ch. 26, sec. 4, repealed the last-mentioned secs. 12 and 13 and substituted therefor a new sec. 12 which provided that any revocation of any appropriation under the Act might be made in the same manner that an appropriation might be made. This new sec. 12 was repealed by ch. 25 of 1898 and another sec. 12 was introduced very similar to the present sec. 15. It contained the first mention of insurance for the benefit of father, mother, brothers or sisters, a class of insurance not under the protection of the Act, and enabled the insurer to "revoke the policy or declaration or appropriation previously made," so that the policy should be in the same condition as if it were made wholly for the benefit of the insured or his estate or executors. In the following year, 1899, by ch. 17, still another sec. 12 was enacted which appears as sec. 15 in the Revised Statutes of 1902 and 1913. This sec. 15 is as follows:

15. If, in case of a policy of insurance heretofore or hereafter effected by a man or woman, it is expressed on the face to be for the benefit of, or has been heretofore or shall be hereafter under this Act appropriated for the benefit of, his wife or her husband, or his wife and children, or her husband and children, or his or her father, mother, sisters and brothers, or any one or more of them, or any other person or persons whomsoever, then the insured may, by an instrument in writing attached to or endorsed on the policy or identifying the same by its number or otherwise, absolutely revoke the benefit or declaration or appropriation previously made and apportion the insurance money, or by life instrument from time to time reapportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, provided that the insured shall not alter or revoke or divert the benefit of any person who is a beneficiary for value.

Now this section does not attempt to repeal secs. 5, 6, 7, 8 and 9. They have all remained in the same statutes for 20 years. Secs. 5-9 have been re-enacted from time to time and are the main sections of the Act as it stands today. They still provide the scheme of insurance for the benefit of wife and children or husband and children, the trust for the beneficiaries, the freedom from control of the insurer or of his or her

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ditors. Sec. 15 purports to enable the insured to revoke the efit of insurance on his life made or appropriated in favour any person whomsoever and to divert the insurance to new eficiaries or to himself or his estate, saving only the rights a beneficiary for value. If sec. 15 applies without qualifica- to the insurance referred to in the preceding sections of Act, the trust in favour of wife and children or husband children is revocable by the insured and he has an absolute posing power over the insurance money. Does the protec- against creditors still remain?

As already shown, the insured has under secs. 5-9 only a ver of appointment over the insurance money amongst a s of persons who are the beneficiaries of the trust and are persons for whose protection the legislation was enacted. . 15 purports to give to the insured a greatly extended ver and to place life insurance for the benefit of wives and dren on much the same plane as that in favour of persons olly outside the protection theretofore given by the Act. e insured may "divert the insurance money wholly or in t to himself." That would appear to give him power to render the policies of insurance, which had hitherto been rust in favour of his wife and children, and receive from insurance companies the surrender value and appropriate o his own use. He may also divert the insurance money to estate and make it liable for his debts. Questions may e as to the rights of creditors of the insured where he has rcised his power in favour of a volunteer under sec. 15. e exercise of the power might have the effect of rendering insurance money liable for his debts. See *Fleming v. hanan,* 3 DeG. M. & G. 976, at 980, 22 L.J. Ch. 886; *Re vley, Zaiser v. Lawley* [1902] 2 Ch. 799, 71 L.J. Ch. 895; *fus v. Lawley* [1903] A.C. 411, 72 L.J. Ch. 781; 23 *Hals.* 4.

Sec. 15 of *The Life Insurance Act* goes far towards de- ying the benefits of the Act in so far as the protection of es and children is concerned. It should be construed with rest of the Act kept in view and the spirit and purpose of original Act should be preserved as far as any reasonable struction of the section will permit. When mention of a

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will is found in secs. 7 and 8 and not in sec. 15, I would find that the omission of the word in the latter was intentional and that the revocation was not intended to be made by will. Even if the expression "instrument in writing," as used in sec. 15 includes a will the policy must be identified "by its number or otherwise." This expression was considered in *In re Cochrane, supra,* heard before a Divisional Court consisting of Boyd, C., Magee and Mabee, JJ. In giving the judgment of the Court, Boyd, C. said:

> The manner of identification of the policy is very explicitly and pointedly provided for. It may be by instrument in writing attached to or endorsed on the policy or apart from actual attachment or endorsement, it may be identified by something equivalent in the way of specific reference by the number of the policy "or otherwise." That would, of course, include reference by date and amount and other means of incorporating one document with the other. Should the words "or otherwise" be extended further to cases where extrinsic evidence is required to complete the identification?

In that case the insured was the holder of a beneficiary certificate in a benevolent society made payable to his wife. In his will he bequeathed

> out of my life insurance fund the sum of $200 to my sister * * and all the rest, residue and remainder of my insurance funds to my daughter.

The learned Chancellor held that this did not sufficiently identify the beneficiary certificate and that it was not permissible to prove by extrinsic evidence that the testator must have referred to it as he had no other policies. The earlier cases of *Re Cheesborough,* 30 O.R. 639, and *Re Harkness,* 8 O.L.R. 720, 5 O.W.R. 533, were distinguished.

In re Cochrane, supra, was followed by Sir W. Meredith, C.J.C.P., in *Re Earl,* 16 O.W.R. 901, 1 O.W.N. 1141. In that case there was a beneficiary certificate in the Canadian Home Circle in favour of testator's wife. He attempted to change the disposition of the money by his will referring to the insurance as "the money that shall come from the Home Circle." This was held not to be sufficient to identify the certificate.

The testator in the case at bar devises to his executors upon certain trusts all the residue of his estate of every kind "including all stocks, bonds, life insurance or the proceeds of any

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icy of insurance." The words quoted do not identify any icy of insurance by its number or by something equivalent. ere was at least one other policy on his life and there may ve been more. The life insurance in the Order of Fors, and the proceeds of it, belonged to the testator's wife l was not his to dispose of. He did not attempt by direct rds to revoke the benefit or appropriation in her favour. may have referred to policies over which he had a dispospower. When giving judgment in the *Cochrane case, ra,* Boyd, C., said:

Where a trust is clearly and distinctly expressed on the policy itself in our of one beneficiary, so that it becomes a vested trust for that person, ould not be displaced or altered except by a document of equal evidenforce in clearness and distinctness of designation (p. 334 [16 O.L.R.]).

In *Arnold v. Dominion Trust Co.,* 56 S.C.R. 433, [1918] W.W.R. 25, it was held that a bequest to testator's wife in se words, "the first seventy-five thousand dollars collected account of policies of life insurance," was not a writing ntifying the policy by number or otherwise.

For the reasons above set out I think the devise in the will question did not deprive the testator's wife of her right the insurance money, as beneficiary under the policy.

I would answer the first question in the stated case as fols: The proceeds of the endowment certificate, being the neys paid into Court, are payable to Elizabeth Richardson, beneficiary designated by the deceased.

To the second question I would answer: No.

As to the third question, the assessment levied under the visions of the Act of 1913, ch. 113, was not a debt of the ceased. As I understand it, there was a deficiency of "acmulated funds" to meet the society's obligations upon outnding mortuary benefit certificates. Power was given to e society by the Act to make a valuation of the assets apcable to insurance purposes. The "valuation deficiency" s then to be apportioned among the members who entered e society before a certain date in proportion to the amount the benefit certificate or certificates of each member. See c. 10 of the Act and clause 4 of the schedule of the Act

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which is made a part of it. The deduction from the policy was the amount of assessment chargeable to the insurance on the life of the deceased and deductible from the money payable under the benefit certificate. This deduction was not a debt of the deceased. He was not bound to keep up the insurance: See *Green v. Standard Trusts Co.*, 22 Man. R. 397, at pp. 411, 416, 1 W.W.R. 993, 20 W.L.R. 488.

The costs of the executors of Hugh Richardson and the costs of Elizabeth Richardson both in this Court and in the Court of King's Bench shall be paid out of the estate of the said Hugh Richardson other than the proceeds of the life insurance policies, the costs of the executors to be as between solicitor and client.

CAMERON, J.A. (dissenting)—This is a case stated for the opinion of the Court involving the construction of the will of the late Hugh Richardson, and the applicability of *The Life Insurance Act*, ch. 99, R.S.M., 1913, to the endowment certificate No. 66713 of the Supreme Court of the Independent Order of Foresters. The facts and the relevant provisions of the Act are fully set out in the judgment of Mr. Justice Macdonald, who held that the amount payable by the order should not go to Bessie Richardson, the wife of the deceased, who is named as beneficiary in the certificate, but become part of his estate to be disposed of by the executors in satisfying the claim of Florence Besley, who is made legatee of one-half of the residue of the testator's estate after payment of certain specific devises and bequests. Mr. Justice Macdonald held that the disposition made by the will was effective under sec. 15 of the Act.

The testator applied for an endowment certificate for $1,000 when a resident of Saskatchewan. It was issued August 1, 1893, and surrendered, and a new certificate issued for $2,000, April 6, 1895, and this is the one in question.

At the time of his death, November 10, 1915, he was a resident of this province. The head office of the Order at the time of the issue of the certificate was in Toronto, Ontario, and has continued to be so ever since.

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The various Acts incorporating, and relating to, the Order ere consolidated in the Act of 3 & 4 Geo. V., ch. 113, assent- l to May 16, 1913. By sec. 10 of this Act it is provided that e powers of the Order shall be exercised in conformity with e provisions thereof.

The objects of the Order are declared to be to unite the embers for fraternal and benevolent purposes and to give ich aid and benefit to them and those dependent on them s may be provided in the constitution and laws (sec. 4).

The constitution and laws of the Order provide by sec. 4, ubsec. 5, as follows: [See *ante*, p. 162].

By sec. 150 the method of changing beneficiaries is care- ully prescribed:

Section 150. (1) Subject to the provisions of this section and of ctions 4, sub-section 5, and one hundred and sixty, and if not repugnant the laws of the Province, State or Country in which the member has a xed place of abode, a member may at any time while in good standing, xcept as hereinafter provided, change his beneficiary or beneficiaries in e following manner:

(a) By filing with his court his application for change of beneficiary on orm No. 14, fully filled in, signed by himself and properly executed, etting forth fully and clearly the changes he desires to make, provided hat a designation of a beneficiary not in conformity with section four, ub-section five, shall be null and void from the beginning.

And there are further provisions as to payment of fees, sur- ender of certificate and approval of the chief ranger or ouncil. These provisions were not complied with in this ase.

By sec. 160, subsec. (1) it is provided that 30 days after eceipts of proof of death, etc., the benefits shall be due and ayable and, subject to the provisions of other sections (in- luding sec. 150), shall be paid to the party or parties entitled o receive the same, and a tender of the cheque of the Order or f a bank draft for the same shall be a sufficient tender. By ec. 162 elaborate provisions are made in respect of proofs of leath and, by subsec. (3), upon receipt of all the proofs ne- essary, a cheque or draft is to be drawn payable to the per- ons legally entitled to receive the benefits. This cheque or draft is by subsec. (5) to be sent to the recording secretary or other officer of the Court of which the decedent was a mem-

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ber, or such other person as may be determined, to be delivered by such officer or person, in the presence of a witness, to the person or persons legally entitled to receive the same on the surrender of the certificate. If the will is to prevail, the parties entitled to receive the benefits, are the executors who are both residents of Winnipeg.

We have to consider the effect of sec. 15 of our *Life Insurance Act* in its bearings on this case. That section first appeared in our legislation as an amendment to sec. 12, ch. 88, R.S.M., 1892; in ch. 17 of the Statutes of 1899; ch. 17, 62-63 Vict. It is a far-reaching provision not to be found in the Statutes of Saskatchewan and Ontario. The question at once arises as to the applicability of our *Life Insurance Act* to fraternal and benevolent organizations such as this Independent Order of Foresters.

In *Cameron on Life Insurance* we find the law of Ontario (from the legislation of which province our own has been drawn) dealing with benevolent, provident and friendly societies in respect of their business as insurers fully discussed (pp. 227 *et seq.*). The by-laws, rules and regulations of these societies, as the learned author points out, usually contain specific provisions with respect to the method by which, and the persons amongst whom a change in the beneficiary may be made by a member (p. 232).

By 47 Vict., ch. 20, the Ontario Act, to secure to wives and children the benefit of life insurance was amended by adding the following:

> The provisions of this Act shall apply to every lawful contract of insurance now in force or hereafter effected which is based on the expectation of human life, and shall include life insurance on the endowment plan as well as every other.

Provision was also made for change of beneficiaries and varying the appointment amongst them. It was held by Proudfoot, J., in *Re O'Heron*, 11 P.R. 422, that the above ch. 20 did not apply to benevolent societies incorporated under the Ontario law. This decision was however overruled by the Court of Appeal in *Swift v. Provincial Provident Institution*, 17 O.A.R. 66, where it was held that the Act in question did not apply to insurance and societies incorporated under the

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tario Act; it is to be noted that although this decision was dered in 1890, it dealt with a certificate of insurance issued a member of the institution whose death occurred in 1887. r. Justice Maclennan held that the words:

surance based on the expectation of human life" [in ch. 20] just mean *insurance*, as distinguished from other kinds of insurance, such as , marine, accident, &c.

Mr. Justice Osler held that contracts of insurance effected benevolent societies are contracts of mutual life insurance the benefit of their members. I can see no difference in aning between the section of the Ontario Act, (sec. 4, ch. of 47 Vict.) in its definition of the words "contract of in- rance" and our own sec. 15, which uses the all-inclusive rds: "a policy of insurance." This phrase as used in that tion, means obviously a policy based on the expectation of man life, and includes every kind of life insurance. In *e Manitoba Insurance Act*, sec. 2, subsec. *(b)*, ch. 98, S.M., 1913, it is enacted that in that Act

expression "company" means and includes any corporation, or any iety or association, incorporated or unincorporated, or any partnership any underwriter, except as provided by section 3, that undertakes or cts for valuable consideration, or agrees or offers so to undertake or ct, in the Province, any contract of indemnity, guarantee, suretyship, urance, endowment, tontine or annuity on life, or any like contract ch accrues payable on and after the occurrence of some contingent nt.

It is difficult to imagine any more exclusive words. It is e the interpretation is in terms, confined to the Act, ch. 98, S.M., but this Independent Order of Foresters comes within and has been licensed under it since July, 1909.

The amending Act of the Ontario Legislature, expressly king the expressions: "contract of Insurance," "policy of urance" and "policy" in the Ontario Act extend to and in- de membership, beneficiary and other contracts entered into any society for fraternal, provident and benevolent pur- ses, was passed in 1888, 51 Vict. ch. 22, subsecs. 1 and 2 view of the decision in *Re O'Heron, supra*, but did not af- t the decision in *Swift v. Provincial Provident Institution, pra*, which was given in 1890, as pointed out.

It was after the last-mentioned enactment that *Mingeaud Packer*, was decided, 21 O.R. 267, 19 O.A.R. 290. In that

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case Mr. Justice Street, the trial Judge, held that the statutory provisions did not affect legal rights otherwise existing, and that the rules of the Ancient Order of United Workmen applied to the policy in question. His decision was based on sec. 23 of the amended Ontario Act, R.S.O., 1887, ch. 136, declaring that nothing in the Act should be held to restrict or interfere with the rights of any person to assign a policy for the benefit of his wife or children in any other mode allowed by law, which is substantially the same as our sec. 30. But this view was overruled by the Appellate Division, whose decision was affirmed by a divided Court of Appeal. In the later case of *Re Harrison,* 31 O.R. 314, it was held that the rules and regulations of the society, in so far as they were inconsistent with the provisions of the Act, must be held to be modified and controlled by them. *Gillie v. Young,* 1 O.L.R. 368, involved questions arising out of an endowment policy in the Catholic Order of Foresters, payable to the brother of the member who had made a will bequeathing the policy certificate to his wife, but who never surrendered the policy certificate for a new certificate in accordance with the rules of the society. Boyd, C., says at p. 374 (1 O.L.R.):

> If then the rules of the society and the enabling powers of the statute are in conflict, I am bound by the authorities to say that the by-laws must yield to the superior power of the Legislature. The society has obtained the advantages of Ontario law in the prosecution of its business, and the whole body, as well as all members of that body, must be taken to know the legal effect of such a privilege: *Re Harrison, supra.*

In *Lints v. Lints,* 6 O.L.R. 100, 2 O.W.R. 550, it was held that the provision of the by-laws of the Independent Order of Foresters, permitting a diversion to a person not within the class prescribed by the Act, was inoperative and that the statute governed.

As I have already stated, so far as the above Ontario provision (sec. 1 of 47 Vict., ch. 20) is concerned, it has, in my opinion, no wider meaning than the words "a policy of insurance," used in our sec. 15. Nor do I consider the wording of the Ontario secs. 1 and 2, 51 Vict., ch. 22, any wider or more inclusive than the words "a policy of insurance." "A policy of insurance" is the most comprehensive phrase conceivable in the relation in which it is used in *The Life Insurance Act,*

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This endowment certificate has its peculiar features, but beyond question, in my judgment, it comes within the term, and is "a policy of insurance," and therefore within sec. 15.

Now, in view of the foregoing considerations, I am prepared to hold that, while the statutory provisions of Ontario differ to some extent from ours in wording and do not have amongst them our sec. 15, nevertheless the reasoning of the Ontario decisions is convincing, and the provisions of our statute therefore override the rules and regulations of the society. It is no objection that to so hold is to give a power to interfere with a contract to one party to it because that is precisely what is done by secs. 7 and 8, as well as by sec. 15. If the Order is subject to the laws of this province, then "the whole body [of the Order] as well as all members of the body must be taken to know the legal effect of such a privilege," as was said by Chancellor Boyd in *Gillie v. Young, supra,* and the certificate is subject to the provisions of our *Life Insurance Act.*

But in this province there have been decisions which point to another conclusion. I refer to the judgment of Killam, J., in *Leadlay v. McGregor,* 11 Man. R. 9, where, however, the statutory provisions before us for consideration, were not involved.

In *In re Anderson's Estate* (1896) 16 Man. R. 177, 3 W.L.R. 127, it was held by the Court of King's Bench in the judgment of Dubuc, C.J., that a certificate issued by the Grand Lodge of the A.O.U.W. of Manitoba, incorporated under the Act then in force respecting charitable, benevolent and savings associations, was not governed by *The Life Insurance Act,* R.S.M., 1902, ch. 83. He held that the order was a benevolent institution, and therefore, not within the Act, and consequently, that the policy was governed by the rules of the Order and not the Statute.

Now what are the grounds assigned in *In re Anderson's Estate, supra,* for holding a fraternal and benevolent society, such as the Ancient Order of United Workmen, not within *The Life Insurance Act?* After pointing out the differences between the disposition permitted the insured to dispose of the

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fund under an ordinary life policy, and that given to members of the lodge, Chief Justice Dubuc held, (p. 184 [16 Man. R.]) that these

> differences go to show that the disposition of the fund secured by the certificate of a member in a benevolent society, such as the one in question here, is not to be regulated by the R.S.M. 1902, c. 83 [now ch. 99, R.S.M.].

But no reason is assigned why these differences should effect that result. Whether the powers given the insured are greater or less can, I submit, make no distinction in the application of the Statute which is general in its terms and covers all policies of life insurance. And that this is a policy of life insurance, is, to my mind, beyond question.

Later in his argument the Chief Justice points out that *The Ontario Insurance Act* has special reference to benevolent societies, but that our statute contains no reference to such. He says:

> It being so, I do not think that its provisions apply to this Grand Lodge of the Ancient Order of United Workmen, which is a benevolent institution (p. 183 [16 Man. R.]).

The result of this view being that the general laws of the Order prevailed over the Statute. In my opinion, this reasoning is inconclusive. It is, in effect, stating that a benevolent institution is not within the Act because it is a benevolent institution. No reason, based on principle, or on the wording of the statute, is assigned why a benevolent society, carrying on the business of insurance under its corporate powers, should not be subject to the Act. With every respect for the opinion of the late Chief Justice it does appear to me that his decision amounts to a judicial amendment to the Act, which is not confined in its provisions to policies issued by "ordinary life companies," but extends to and includes all life-insurance policies.

This decision was followed in *Re Drysdale's Estate*, 18 Man. R. 644, 10 W.L.R. 642, by Mr. Justice Mathers in respect of a policy in the Canadian Order of Chosen Friends. The other policy before him in the same case, issued by the Woodmen of the World, he held was governed by *The Life Insurance Act* on the ground that there was nothing in the by-laws or constitution of this association by which the proceeds are payable to any particular class, or by which the pro-

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ceeds are in any way controlled. It was, however, evidently a benevolent association, and so far as this part of the decision is concerned, it is, as I see it, at variance with the decision in the *Anderson Case, supra,* where Chief Justice Dubuc held that the provisions of our *Life Insurance Act* did not apply to the Grand Lodge of the Ancient Order of United Workmen, "which is a benevolent institution," and that, therefore, the constitution and general laws of the Grand Lodge governed, and not the statute. (P. 187 [16 Man. R.]).

Mr. Cameron in his work on *Life Insurance* observes with reference to the judgment in *Re Drysdale's Estate* that:

> If this distinction is to be relied upon, it would mean that *The Manitoba [Life] Insurance Act,* in the opinion of the learned Judge, would apply to insurance certificates issued by benevolent societies wherever there was no inconsistency between the by-laws, rules and regulations of the society as regards the disposition of the benefit and that of the Act, but that where there was such inconsistency, the by-laws, rules and regulations would govern.

As stated above, the basis of Chief Justice Dubuc's judgment in the *Anderson Case, supra,* was that the Ancient Order of United Workmen was not an insurance company, but a benevolent association and was not therefore within the Act. But no such exception is to be found in the words of the Act, and I see no reason why that exception should be read into it. One leading purpose of the Act is to protect the insurance fund from creditors, and the necessity for that protection is just as great in the case of these fraternal society policies as in any other. In some of these fraternal organizations, the social features have been subordinated almost altogether to the active business of insurance on a heavy scale. Their certificates or policies have been issued in vast numbers and with varying conditions, and I think it impossible to draw any fundamental distinctions between such certificates and the policies of ordinary life-insurance companies.

I find myself entirely unconvinced by the reasoning in *In re Anderson's Estate* and *Re Drysdale's Estate, supra* (in so far as the decision in that case follows that in *In re Anderson's Estate).* I am satisfied that the words in sec. 15 are absolute and unequivocal and include such a policy of insurance as this certificate. There is no doubt in my mind that such was the

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intention of the Legislature. If it had intended to exclude benevolent institutions from the operation of the beneficial provisions of the Act, it would surely have said so in unequivocal terms.

The question next arises as to whether the exercise of the power of revocation of the benefit under the certificate is governed by the laws of this province. The insured at the time of his death was a resident of this province. The head office of the Order was and is at the city of Toronto in Ontario.

By sec. 4, subsec. (5) of the constitution already referred to, the insurance shall be paid to the prescribed persons who are designated as beneficiaries, or, with the approval of the chief ranger, to such beneficiaries as may be permitted by the laws of the province in which the member resides at the time of making such designation. By sec. 150, also already quoted, a member may, subject to the constitution, and if not repugnant to the laws of the province where he has a fixed place of abode, change his beneficiary in the manner prescribed.

By secs. 160 and 162 as above set out, the amount of the benefit under the certificate is to be paid to the parties entitled to same, and the cheque or draft for the amount is to be personally delivered by the proper officer to the beneficiary on surrender of the certificate. It is to be noted that in sec. 160 appear, in connection with the provisions as to designation of beneficiaries, the words: "not in conformity with the laws of the Province" (subsec. [2]); "not repugnant to the laws of the Province" (subsec. [3] and subsec. [5]) and "repugnant to the laws of the Province" (subsec. [4]), referring in each case to the province in which the member had a fixed place of abode.

In view of the foregoing stipulation of the constitution and laws of the Order, made part of the contract of insurance, payment of this certificate and the person to whom it is to be paid are, I submit, intended to be determined by the laws of the province where the member had his fixed place of abode at the time of his death.

I refer to the judgment of Mr. Justice Bain in *National Trust Co. v. Hughes,* 14 Man. R. 41, where the policy there in

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question made the moneys under it payable at the head office of the company in Ontario, and contained no such provisions as are set out in the constitution and laws of this Order as parts of the policy before us. Yet Mr. Justice Bain held that the right given the insured by the Statute to revoke his wife's benefit and divert it to his estate was effectively exercised if exercised according to the law of the domicile of the insured.

Mr. Justice Bain in that decision referred to *The Manitoba Insurance Act,* but does not take its provisions into consideration in arriving at his decision. That Act, now ch. 98, R.S.M., 1913, defines "company" as above set out. The definition includes any company, association, partnership or underwriter doing in this province any kind of what may be called ordinary insurance. By sec. 3 the provisions of the Act do not apply to companies entering into all such contracts of insurance that are licensed by the Dominion of Canada save those specified. Those specified sections include sec. 2 (the interpretation clause) secs. 5 to 21 inclusive, which compel the registration and licensing of companies including licenses of the Dominion of Canada; and prescribe the documents to be filed in order to obtain a license including a power of attorney from the company to the inspector of insurance which shall declare the chief agency of the company in this province; authorize the inspector to receive service of process and declare such service legal and binding on the company. By sec. 14 a company taking out a license is to have the same powers and rights as if incorporated by an Act of the provincial Legislature and other stipulations are set out in other specified sections regulating and controlling such Dominion companies. The effect of these provisions seems to me to be that the Dominion companies receiving a Manitoba license attorn, and subject themselves to the laws of this province. The result is as if they were re-incorporated in Manitoba, and it follows that the provisions of *The Life Insurance Act* apply to and govern Dominion licensed companies that elect to become licensed in this province.

Sec. 47 of *The Manitoba Insurance Act* provides as follows:

The moneys payable under any policy of life assurance already issued, or that may hereafter be issued by a company that has already obtained,

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or may hereafter obtain a license or certificate of registration under the provisions of this Act, or any Act for which this Act is substituted, shall, in all cases, be payable in this Province, when the assured resides therein, notwithstanding anything contained in any such policy or the fact that the head office of the company is not within this Province.

It is plain that there is an apparent inconsistency between this section and sec. 3. Where repugnancy exists in a statute, it is the general rule that the later enactment rules.

Where two co-ordinate sections [of a statute] are apparently inconsistent an effort must be made to reconcile them. If this is impossible the later will generally override the earlier. [27 *Halsbury*, p. 136.]

It is a cardinal principle in the interpretation of a statute, that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other. [Per James, L.J., in *Ebbs v. Boulnois*, 10 Ch. App. 479, at p. 484, 41 L.J. Ch. 691.]

If the two inconsistent enactments cannot be so treated then "the known rule is that the last must prevail," per Keating, J. in *Wood v. Riley*, L.R. 3 C.P. 37, 37 L.J.C.P. 24. See *Craies' Hardcastle*, pp. 198 *et seq.*

In accordance with the well-settled principle that the last expression of the legislative will is the law, in the case of conflicting provisions in the same statute * * * the last enacted in point of time prevails. [36 *Cyc.* 1130.]

There is another rule of interpretation which is directly applicable here.

Where general terms of expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions will be given effect as clearer and more definite expressions of the legislative will. [*Ibid.*]

Now sec. 3 of *The Manitoba Insurance Act* refers to all companies licensed by the Dominion undertaking any of the kinds of insurance, fire, life, guarantee and the others set out in sec. 2. Not so with sec. 47, which refers only to policies of life insurance issued by companies licensed under the Manitoba Act. The effect is as if sec. 47 began with the words: "Notwithstanding anything hereinbefore contained." In my opinion, in view of the foregoing considerations, sec. 47 does apply to life policies whenever issued by a company licensed to do business in this province, as this order was and is, and makes them payable in this province, and subject therefore to the provisions of our *Life Insurance Act.*

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I agree with the trial Judge that the endowment certificate in question is sufficiently identified in the will; that the will is effective as an instrument in writing, and that the insured has thereby exercised his statutory power in accordance with the provisions of our *Life Insurance Act.*

Amongst the numerous authorities to be found, which, in my opinion, support this conclusion, I refer to *McKibbon v. Keegan,* 21 O.A.R. 87, at p. 96; *Re Cheesborough,* 30 O.R. 39; *Re Harkness,* 8 O.L.R. 720, 5 O.W.R. 533; *Re Watters,* 3 O.W.R. 385; and *Re Roger,* 18 O.L.R. 649, at p. 650, 14 O.W.R. 267 (where it is pointed out that the decision in *Re Harkness* and *Re Cheesborough* are not affected by that in *Re Cochrane,* 16 O.L.R. 328, 11 O.W.R. 956); *Arnold v. Dominion Trusts Co.,* [1917] 1 W.W.R. 643, 24 B.C.R. 321; *Re Baeder and Canadian Order of Chosen Friends,* 36 O.L.R. 0, 9 O.W.N. 88, 462; *Re Monkman and Canadian Order of Chosen Friends,* 42 O.L.R. 363, 14 O.W.N. 29; and *National Trust Co. v. Hughes, supra,* at p. 50 (14 Man. R.).

I would affirm the judgment of the trial Judge and dismiss the appeal.

HAGGART, J.A.—The facts relevant to the transaction in question and the legislation affecting the life insurance have been carefully and fully set forth in the reasons of the trial Judge, Mr. Justice Macdonald, of the Chief Justice and of Mr. Justice Cameron, whose judgments I have been permitted to peruse.

An attempt to supplement the statements therein given would be running the risk of indulging in some repetition, which would not be profitable under the circumstances. I accept their statements as containing all that is necessary in considering the questions we are asked to answer.

The trial Judge, Mr. Justice Macdonald, finds that with respect to the policy of insurance with the Confederation Life Association there was an assignment of all benefit to the wife, and that the proceeds are payable to Elizabeth Richardson as assignee, subject of course, to the repayment of the loans made upon it by the insurance company. I would affirm his finding in this respect.

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More serious questions present themselves when we come to consider the endowment certificate with the Supreme Court of the Independent Order of Foresters. There the wife is in the original certificate designated as the beneficiary, but the trial Judge, Mr. Justice Macdonald, holds that the bequest contained in par. 6 of the will of Richardson revoked the benefit conferred by the endowment certificate, and substituted the executors as new beneficiaries. For greater certainty, I will set forth *verbatim* the text of the bequest in the will, and also the words of sec. 15, ch. 99, R.S.M., 1913.

Par. 6 containing the bequest is as follows:

6. I give, devise, and bequeath unto my said Executors all the rest, residue and remainder of my estate, both real and personal of every kind and nature and wheresovever situate including all stocks, bonds, life insurance or the proceeds of any policy of insurance, all moneys on hand or on deposit in any Bank or Trust Company and the interest due or accruing due thereon, for the purpose and upon the trusts following, that is to say:

(a) To pay one-half thereof as soon as realized, unto the said Florence Besley for her own use absolutely.

(b) And from out of the remaining one-half thereof, my said executors may in their sole and absolute discretion set aside or apart such portion thereof as they see fit and proper, and pay or contribute such part or portion of the same in such manner as at such time or times as they see fit and proper towards the maintenance and support of my wife Elizabeth Richardson, who shall have no right, title, claim, interest or demand upon any part of such moneys, upon my estate, or upon or against my said executors for the same or any part thereof, the sole discretion in the application of such contribution or payment in or towards such support and maintenance being wholly in the discretion of my said executors and only so long as they see fit and proper. If my said executors decide not to contribute or apply any part of said moneys at any time towards such support and maintenance which they shall have power to do, they then may pay over the balance, or whatever may remain of it unto the said Florence Besley, whose receipt therefor, shall be an absolute release and discharge to my said executors and estate.

Sec. 15 of ch. 99, R.S.M., 1913, of *The Life Insurance Act*, reads: [See *ante*, p. 170].

With all due respect to the reasoning of the trial Judge and my brother Cameron, I do not think that the bequest made under the circumstances was a transfer or assignment of the insurance moneys mentioned in the certificate, such as was contemplated by the Legislature even under sec. 15. I do not think such an indefinite, inconclusive and inchoate document

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s the bequest in the will of a man who is still alive would ansfer that insurance from his wife to the housekeeper. I ink it was never intended that sec. 15 should have the power at is contended for it.

It is to be observed that the endowment certificate created trust, designated the fund, and named the beneficiary. That equest in the will should not so alter the whole character of e property that it would divest the wife of the same and ecome absolutely the property of the executors, and I might y that I do not think it is material or important to consider hether the insurance laws of Saskatchewan, Ontario or Ianitoba should govern.

I think there should be a direction in the judgment of the ourt that the proceeds of this endowment certificate should e paid to the wife.

FULLERTON, J.A.—The learned trial Judge has held that ec. 15 of *The Life Insurance Act* (R.S.M., 1913, ch. 99) enbled the testator to divert the insurance moneys from the eneficiary named in the endowment certificate to the testaor's estate.

His judgment is, of course, based on the assumption that he operation of the will in relation to the endowment certifiate is governed by the law of Manitoba.

Questions as to the applicability of *The Life Insurance Act* o contracts of the peculiar nature covered by the endowment ertificate and as to the effect of sec. 15 were very fully disussed at the argument.

My view is that it is not necessary for the determination of his appeal to discuss either of these questions because I think he statute in question has no bearing here, that is, the validty of the attempted revocation is in no way affected by the aw of Manitoba.

The endowment certificate reads:

that in consideration of the statement and representations contained in the applications for membership * * * * and the provisions of the Constitution and Laws prescribed from time to time by the Supreme Court of the Independent Order of Foresters (all of which statements, representations and provisions have been assented to by the applicant, and are by the

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parties hereto, referred to and made part of this contract) * * * this endowment certificate is issued by which the Supreme Court of the Independent Order of Foresters agrees to pay and does by these presents agree to pay to brother Hugh Richardson of Battleford, Sask., on his reaching his seventieth birthday, and on each subsequent birthday an annuity benefit of two hundred dollars till the full sum of two thousand dollars is paid, less any sum paid on account of the Total and Permanent Disability Benefit * * *

It doth further agree to pay to the widow, or other beneficiary designated * * * on due and satisfactory proof of his death an endowment benefit of two thousand dollars * * *

The certificate purports to have been executed at the city of Toronto, the headquarters of the Independent Order of Foresters on April 6, 1895.

It will be observed that the late Hugh Richardson is described in the certificate as "of Battleford, Sask."

The stated case gives no information as to his removal to Winnipeg, nor does it state that he at any time acquired a domicile in Manitoba.

We have then the fact that the contract evidenced by the endowment certificate was executed at Toronto in the Province of Ontario on the life of a man residing at Battleford in the province of Saskatchewan.

How then can the law of Manitoba apply?

The only circumstance that can be appealed to in support of the contention that the law of Manitoba applies is that the will was made in Manitoba.

In *National Trust Co. v. Hughes,* 14 Man. R. 41, the testator, who lived in Manitoba, had effected an insurance on his life in an Ontario company, which, on the face of the policy, was expressed to be for the benefit of his wife. By his will he absolutely revoked the appropriation and directed that the insurance moneys should form part of his estate.

The plaintiffs, the executors and trustees under the will, brought an action for a declaration as to the effect of the clause in the will.

By the law of Ontario a person who has effected insurance on his life for the benefit of his wife could not divert the benefit of the policy to his estate, while under the law of Manitoba this could be done.

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Bain, J. held that the law of Manitoba applied to the determination of the question as to the right of the assured to make such new disposition.

The learned Judge based his decision on the case of *Lee v. Abdy*, 17 Q.B.D. 309, 55 L.T. 297. In that case a man living in Cape Colony assigned to his wife a policy of life insurance, which he held in an English company. By the law of Cape Colony the assignment was void.

The question then was, whether the law of England or the law of Cape Colony applied?

The Court held that the law of Cape Colony applied, basing its decision on the general rule that the validity and incidents of a contract must be determined by the law of the place where it is entered into.

Bain, J., in his judgment in the *Hughes Case, supra,* admits that the revocation by the insured of his wife's benefit in the policy is a very different thing from a contract of assignment of the policy, but says that: "It was the exercise of a right incident or relating to the policy which belonged to him by the law of the place where he lived."

In view of the recent decisions, both in England and in Ontario, I think the decision in the *Hughes Case, supra,* cannot now be regarded as the law.

The operation of the exercise by will of a power of appointment, created either under an English or under a foreign instrument, depends on the law which governs the operation of the instrument, and not on the law which governs the operation of the will. [*Dicey's Conflict of Laws*, p. 705.]

In *Pouey v. Hordern* [1900] 1 Ch. 492, 69 L.J. Ch. 231, it was held that a domiciled Frenchwoman having, under an English settlement, a special power of appointment over funds in England, can exercise the power in such a way as to dispose of the property in a manner inconsistent with her position under the law of France. Farwell, J., at p. 494 ([1900] 1 Ch.) points out that the exercise of the power does not involve a disposition of property belonging to the testator. See also *In re Megret, Tweedie v. Maunder* [1901] 1 Ch. 547, 70 L.J. Ch. 451; *In re Bald, Bald v. Bald,* 66 L.J. Ch. 524, 76 L.T. 462.

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In *Re Baeder and Canadian Order of Chosen Friends*, 36 O.L.R. 30, 9 O.W.N. 88, 462, the facts were as follows: An Ontario benevolent society in 1890 issued to "B." then domiciled in Ontario, a benefit certificate for $2,000 which provided that this sum should, upon his death, be paid to his three children, equally. "B." subsequently changed his residence and domicile to the State of New York, and died there in 1915. The policy or certificate was in force at the time of his death. By his will, made in that State shortly before his death, he provided as follows: "I give, devise and bequeath to my granddaughter C. W., all my life insurance that I may have and in force at the time of my death." The will was duly executed according to the laws of Ontario and New York.

The contention on behalf of the children was that the law which governed the operation and effect of the will upon the policy was the law of New York, and that according to the law of New York, beneficiaries in an insurance policy cannot be changed by will.

On behalf of the granddaughter it was contended that the policy was governed by the law of Ontario.

The Court, consisting of Meredith, C.J.C.P., Riddell, Lennox and Masters, JJ., unanimously held that the law of Ontario and not the law of New York applied, and that a valid change of beneficiaries had been made by the will.

It is difficult to draw any distinction between a power of appointment and an appointment or declaration respecting the beneficiary in a policy of life insurance, such as the one in question.

In *Leadlay v. McGregor*, 11 Man. R. 9, Killam, J. held that a member of an unincorporated society known as the Order of Scottish Clans, who held a certificate of membership entitling the beneficiary named therein to the sum of $2,000, payable at the death of the member, had no interest in the fund raised or to be raised but merely a power to appoint an object to receive the same.

In the light of the above authorities, I think there can be no question but that the rights and liability of the parties in re-

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spect of the effect of the attempted revocation are governed by the laws of either Ontario or Saskatchewan.

If it were necessary to determine whether the contract in the present case was made in Ontario or Saskatchewan, there would be difficulty in doing so upon the facts set out in the stated case. The law on the point is, however, the same in both provinces.

The statutory provisions in Ontario are to be found in *The Ontario Insurance Act,* R.S.O., 1914, ch. 183.

Sec. 178, subsec. (1) is as follows:

Preferred beneficiaries shall constitute a class and shall include the husband, wife, children, grand-children and mother of the assured * * *

Sec. 178, subsec. (2) is as follows:

Where the contract of insurance or declaration provides that the insurance money or part thereof, or the interest thereof, shall be for the benefit of a preferred beneficiary or preferred beneficiaries such contract or declaration shall, subject to the right of the assured to apportion or alter as hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration.

Sec. 179 provides that the assured

shall not * * revoke or alter any disposition * * in favour of any one or more of the preferred class except in favour of some one or more persons within the preferred class so long as any of the persons of the preferred class in whose favour the contract or declaration is made are living.

The legislation in Saskatchewan with respect to insurance for the benefit of wives and families was copied from Ontario and is to be found in *The Saskatchewan Insurance Act,* (ch. 15, Statutes of Saskatchewan, 1915).

Sec. 186, subsecs. 1 and 2, corresponds with sec. 178, subsecs. 1 and 2, of the Ontario Act, and sec. 187 with sec. 179 of the Ontario Act.

Under the provisions above quoted the declaration in the will in favour of the executor is clearly invalid in so far as it affects the certificate in question.

Appeal allowed, Cameron, J.A., dissenting.

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COURT OF APPEAL

IN RE BY-LAW NO. 92, TOWN OF WINNIPEG BEACH

Before PERDUE, C.J.M., CAMERON, HAGGART and DENNISTOUN, JJ.A.

Municipal Corporations—By-Law—Reasonableness — Attitude of Courts Thereon—Power to Create a Forfeiture—Delegation of Authority by Council—Power to Fine Not Including Power to Forfeit.

A municipal by-law should not be condemned as unreasonable merely because particular Judges may think it goes further than is prudent or necessary, or that it should have some qualification or exception. It ought to be "benevolently" interpreted and credit should be given those administering it that it will be reasonably administered. As a rule the question of reasonableness may be safely left to the ratepayers acting through their representatives in the council.

A by-law requiring permits for the erection of tents on vacant lots cannot without express statutory authorization provide for cancellation of a permit by way of forfeiture so as to deprive an owner of the right to use his land in an unobjectionable manner.

Powers given to a municipal council acting as one deliberate body cannot be delegated without statutory authority.

A power to fine does not include a power to forfeit in the absence of clear statutory authority.

ARGUED: 29th September, 1919.
DECIDED: 14th October, 1919.

Statement. APPEAL from an order of Galt, J., dismissing application to quash a by-law of the town of Winnipeg Beach. Appeal allowed and by-law quashed with costs.

W. J. Donovan, for W. J. Wood.
L. D. Smith, for the municipality.

The judgment of the Court was delivered by

DENNISTOUN, J.A.—This is a motion to quash a by-law of the town of Winnipeg Beach and is by way of appeal from an order of Galt, J., who dismissed the application when it came before him.

The by-law was passed under the provisions of sec. 581 of *The Municipal Act,* R.S.M., 1913, ch. 133, as amended by sec. 10 (r) of ch. 66, 4 Geo. V., sec. 15 of ch. 43, 5 Geo. V., and sec. 10, ch. 62, 9 Geo. V., which now reads:

581. The Council of every municipality may also pass by-laws,—(*r*) for licensing and regulating or preventing and prohibiting or restricting buildings and structures partly of wood, partly of canvas, felt or other light materials, tents and other similar structures, or additions thereto or alterations thereof, in specified parts of the municipality.

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The by-law provides that the word "tent" shall include erections commonly known as tents and also temporary structures as set forth in the statute.

It limits the number and size of tents which may be erected on town lots and provides that on lots where there is no summer cottage or other permanent building one tent only may be erected, but such tent shall not be erected or used until a written permit shall have been obtained from the secretary-treasurer of the town, for which a fee of 50 cents is payable.

Permits may be granted by the council on special terms in respect of lots containing more than 11,250 square feet.

The town of Winnipeg Beach is a summer resort which it is stated at times contains as many as 15,000 temporary inhabitants, while at other times the resident population falls to less than 100.

The by-law contains clauses which relate to sanitary arrangements and to scavenging, to which objection has not been taken. It is manifest that its whole object is to protect the health of the inhabitants and by reason of the nature of the circumstances surrounding the occupation of this summer town it is difficult to frame regulations which will bear equally on all classes of property owners.

Such discrimination as does exist in this by-law does not appear to be unreasonable, and in any event it is not the duty of Judges to determine with meticulous care what is and what is not reasonable in a case of this kind. Municipal by-laws as Lord Russell of Killowen remarked, are not like the laws of the Medes and Persians—they are not unchangeable; *Kruse v. Johnson,* [1898] 2 Q.B. 91, at p. 98, 67 L.J.Q.B. 782. The municipality has power to make by-laws from time to time as shall seem meet, and if experience shows that in any respect they work hardly or inconveniently, the municipal council acted upon by public opinion, has full power to repeal or alter them.

Such by-laws are in a different position from those of corporations carrying on business for profit, though incidentally for the advantage of the public. In this latter class of case it is right that the Courts should jealously watch the exercise of these powers and guard against their unnecessary or un-

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reasonable exercise to the public disadvantage. By-laws of a municipal character, such as the one under consideration, ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted and credit ought to be given to those who have to administer them that they will be reasonably administered.

A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary, or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. In matters which directly concern the people of the municipality who have the right to choose those whom they think best fitted to represent them in their council, such representatives may be trusted to understand their own requirements better than most Judges. There is a wide diversity of judicial opinion on such subjects and Judges can lay down no definite principle or standard by which reasonableness or unreasonableness may be tested.

The applicant asks that the by-law be quashed upon the following grounds: (1) That it is ambiguous and unreasonable in its terms; (2) That it discriminates as between property owners in fixing the areas of the lots to which the restrictions shall apply; (3) That there is no statutory authority for the cancellation of a license or permit issued under a by-law of this character; (4) That the council had no authority to delegate to the mayor power to cancel such a license or permit; (5) That the penalty provided by the by-law for an infraction thereof:

> $50 and costs, upon conviction before a magistrate, and in addition any permit issued hereunder may be cancelled and declared null and void by order of the Mayor.

is *ultra vires* of the council being in excess of what is authorized by sec. 579 (*a*) of *The Municipal Act*.

Objections (1) and (2) are governed by the remarks previously made and may safely be left to the ratepayers of the town for such action as they may see fit to take through their representatives in the council. These objections are not of a character to call for judicial interference.

Objection (3) is of a more serious character.

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In *Bannan v. Toronto*, 22 O.R. 274, it was held by Chancellor Boyd that the power given to municipal corporations under sec. 285 of R.S.O., ch. 184, to determine the time during which victualling licenses shall be in force "does not confer any power to forfeit such licenses, but merely to fix the duration of the license." The power to create a forfeiture of property is one which must be expressly given to a corporation by the Legislature, and such an extraordinary power is least of all to be inferred where the Legislature has provided other means of enforcing by-laws by means of fine and amerciament.

This by-law seriously interferes with the common-law rights of property owners and while it must be benevolently construed in so far as the health and the general welfare of the community are concerned, it must be strictly construed in so far as it derogates from private rights. The owner cannot place a temporary building or a tent upon his own land except by permit, which may be withdrawn by order of the mayor. Such drastic action must be clearly authorized by the Legislature. The absence from the statute of express power to cancel such a permit cannot be supplied by analogy from what may be done in other cases which are specifically provided for.

The by-law entrusts the issuing of the license to the secretary-treasurer, but in a ministerial capacity only. On discharge of certain reasonable sanitary obligations by the owner of the land the license will issue apparently as a matter of right, and not of discretion. It is to be presumed that the secretary-treasurer will not act in an arbitrary manner and such delegation of authority to him is unobjectionable.

But the power to cancel given to the mayor is of a different character. He may use his discretion and cancel or not as he sees fit, after conviction of the owner of a violation of the by-law, and thereby deprive him of the right to use his land in an unobjectionable manner. The opinion is therefore expressed that it was *ultra vires* of the council to make provision for the cancellation of permits regularly issued under the by-law.

The fourth ground of objection is to the delegation of power to cancel permits to the mayor, and is a valid objection for the

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reasons given in respect to objection (3), and for the further reason that even if power to cancel a permit under this by-law should be held to pertain to the council, that power could not be delegated without statutory authority. Powers which are given to a council constituted to act as one deliberative body to the end that the members may assist each other by their united wisdom and experience cannot even by vote be delegated to the mayor alone: *Dillon*, sec. 244.

By this by-law the permit may be revoked by the mayor even though all the requirements necessary to obtain that permit have been maintained unimpaired. For an offence committed in respect to matters outside what is authorized by the permit, say the erection of an additional tent, the permit regularly granted may be revoked in respect to the tent or building as to which no offence has been committed. This ground of objection should therefore prevail.

The fifth and last ground of objection that the penalty provided is *ultra vires* is also well taken.

Sec. 579 (*a*) of *The Municipal Act* provides that

The council of every municipality may also pass by-laws,

(*a*) for inflicting reasonable fines and penalties, not exceeding fifty dollars, in addition to costs, for breach of any of the by-laws of the municipality.

This by-law provides for a penalty

not exceeding fifty dollars and costs, upon conviction before a magistrate, and in addition, any permit issued hereunder may be cancelled and declared null and void by order of the Mayor.

That a power to fine does not include a power to forfeit in the absence of clear statutory authority is strikingly illustrated by the case of *Heise v. Town Council of Columbia*, 6 Rich. (S. Car.) Law, 404, quoted by *Dillon on Municipal Corporations*, sec. 618. There the town council had power to enforce obedience to their ordinances "by fine not exceeding fifty dollars." Special authority was given to municipal corporations to grant licenses to retail liquor. The council passed an ordinance relating to this subject, the penalty for violating which was a "fine of not more than fifty dollars for each offence, and also a forfeiture of the license." It was held that the license which was granted and paid for was essentially *property;* that

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the council could only impose fines, and that it had no power to ordain a forfeiture of the license, there being no difference between the forfeiture of a license and of goods and chattels. This reasoning appears to be sound and in accordance with the principles governing the administration of municipal law in this province.

Opinion is therefore expressed that upon the fifth ground of objection the by-law is defective.

The following authorities were referred to upon the argument: *Re Taylor and Winnipeg,* 11 Man. R. 420; *Reg. v. Webster,* 16 O.R. 187; *Rex v. Pope,* 7 Terr. L.R. 314, 4 W.L.R. 278; *Re By-law 8030, Winnipeg,* 24 Man. R. 646, 6 W.W.R. 1433, 29 W.L.R. 182; *Dunn v. R.M. of Ste. Anne,* 6 W.W.R. 1083, 29 W.L.R. 197; *Re Crabbe & Swan River,* 23 Man. R. 14, 3 W.W.R. 1047, 23 W.L.R. 372; *Slattery v. Naylor,* 13 App. Cas. 446, 57 L.J.P.C. 73; *Kruse v. Johnson, supra, Wood v. Ledbitter,* 13 M. & W. 838, 14 L.J. Ex. 161.

It does not appear that any useful purpose would be served by separating the clauses of this by-law so as leave the unobjectionable clauses unaffected by this application. The by-law as a whole is of a useful character and will no doubt be re-enacted in amended form.

The appeal should be allowed and the by-law quashed with costs.

Appeal allowed and by-law quashed with costs.

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CHAMBERS—COURT OF APPEAL

KOWHANKO

v. THE J. H. TREMBLAY COMPANY, LIMITED ET AL

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Workmen's Compensation—Constitutional Law—The Workmen's Compensation Act, Man.—The Workmen's Compensation Board—Not a "Superior" Court—Appointment of Members as Provided by Act Intra Vires.

The Workmen's Compensation Board constituted by *The Workmen's Compensation Act* of Manitoba is not a "Superior Court" in the sense contemplated by secs. 96, 99 and 100 of *The B. N. A. Act*, and the appointment of the members thereof by the Lieutenant-Governor in Council, as provided by *The Workmen's Compensation Act*, is *intra vires*.

Judgment of Mathers, C.J.K.B. reversed on this point.

The said Board is merely an administrative body created with the powers deemed necessary to carry out effectively the scheme provided by the Act and having incidentally certain judicial functions to perform.

Semble the presumption is that *de facto* members of the Board were validly appointed and their appointment should not be open to attack in a collateral proceeding, the proper proceeding for such purpose being by *quo warranto* information.

Statement. Appeal by plaintiff from an order of the Referee in Chambers dismissing plaintiff's action for damages for personal injury from an accident while in defendants' employment. The order of the Referee was made on an application of the defendants following an order of the Workmen's Compensation Board declaring that plaintiff had a right to compensation under Part I. of *The Workmen's Compensation Act*, ch. 125 of 1916, Man., by reason of the accident, and that the matter was one in which the right to bring action for or by reason of the accident was taken away by said Act. After the Referee's order was made the pleadings were amended pursuant to an order by Galt, J. in Chambers, and by the pleadings as amended the constitutionality of the Act was raised. By reason of this amendment, the motion, though in form an appeal from the Referee, was not in reality an appeal against a decision made by him. The question of the constitutionality of certain sections of the Act being decided adversely to the defendants' contention the order of the Referee was set aside with costs against the defendants by the Chief Justice of the Court of King's Bench. On appeal to this Court the latter order was

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reversed and, the order of the Referee dismissing the action restored.

21st March, 1919.

THE REFEREE—Motion by defendants to strike out the plaintiff's statement of claim or dismiss the action on the ground that under subsection (1) of section 13 of *The Workmen's Compensation Act*, 1916, ch. 125, the action does not lie.

I am satisfied upon the material read that the action was brought by reason of an accident which happened to the plaintiff while in the employment of the defendants in an industry included in the list of those to which Part I of the Act applies, and that the accident happened after the day named by proclamation, as mentioned in section 3 of the Act; also that the plaintiff has made a claim for compensation under Part I of the Act against the employer, and that compensation has been awarded to him by the Board under the Act in respect of the said injury, and that all the conditions are satisfied entitling the defendants to an adjudication that the action is one which did not lie.

These are all matters, however, which would have to be determined in the ordinary course by the Judge at the trial, and, apart from the question raised under subsection (2) of section 13, there would, in my opinion, be no jurisdiction in a Judge in Chambers either to dismiss or stay proceedings in the action. A defendant, for instance, could not, upon an affidavit showing that the plaintiff's claim was barred by *The Statute of Limitations*, get an order dismissing the action but the objection would have to be decided upon by a Judge at the trial.

Defendants urged that Rule 639 of *The King's Bench Act*, R.S.M., 1913, ch. 46, would warrant the making of the order asked for and produced a certificate proving the adjudication by the Workmen's Compensation Board under subsection (2) of section 13 referred to above, contending that that is a "document" within the meaning of Rule 639.

I have considerable doubt as to whether it is or not. See *Cook v. Lemieux*, 10 P.R. 577, and *Henebery v. Turner*, 2 O.R. 284, but I do not find it necessary to decide whether the

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motion should succeed under that Rule, as I think it should be granted upon a different ground.

It has been shown that the defendants applied to the Board under subsec. (2) of sec. 13 for adjudication and determination of the question of the plaintiff's right to compensation under Part I of the Act and as to whether the action was one the right to bring which is taken away by the Act, and that there was an adjudication and determination of that question by the Board in favour of the defendants. That subsection declares that such adjudication and determination shall be final and conclusive. It seems to me that the Legislature has here substituted the Workmen's Compensation Board as the tribunal to decide whether or not the present action will lie, and it being shown that that tribunal has decided that the action is one which does not lie, it is clearly my duty to dismiss it, in the absence of any question being raised as to the constitutionality of the Act.

It seems clear to me upon the authorities that, where circumstances are proved to exist under which the Legislature has enacted or the law clearly shows that no action will lie, it is proper on a motion in Chambers to dismiss any action brought under such circumstances. See *Hill v. Hill*, 2 O.L.R. 289, 541; 3 O.L.R. 202; *Burwell v. London Free Press Printing Co.*, 27 O.R. 6; *Benner v. Mail Printing Co.*, 24 O.L.R. 507, 3 O.W.N. 56, 20 O.W.R. 21; *Dingle v. World Newspaper Co.*, 43 O.L.R. 218, 14 O.W.N. 251.

It might, perhaps, also be said that to bring an action under such circumstances was vexatious if not frivolous, and the Court has inherent jurisdiction on a motion in Chambers to dismiss it as an abuse of its process. See *Metropolitan Bank v. Pooley*, 10 App. Cas. 210, 54 L.J.Q.B. 449, and other cases cited in *Holmsted*, 4th ed., at pp. 45 and 46, also *In re Marquette Election*, 11 Man. R. 581, per Dubuc, J., at 395.

W. M. Crichton, for plaintiff.

A. A. Fraser, for Tremblay and the Attorney-General.

26th January, 1920.

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MATHERS, C.J.K.B.—In this case the plaintiff brought an ion in this Court for damages for a personal injury by an cident sustained by him while in the defendants' employ- nt.

The defendants were contractors for a portion of the pipe e for the Greater Winnipeg Water District, in the execution which they used and operated a railway alongside the work. hile engaged in hauling material from one part of the work another on the railway, the locomotive was derailed and the intiff, who was riding thereon, was seriously injured.

It is alleged that his injury was due to the negligence of the fendants in that the locomotive and car used by them were an unsafe condition and unfit for the purposes for which ey were used. In the alternative it is alleged that the dam- es were due to the negligence of the defendants' foreman, whose orders plaintiff was bound to conform and to the gligence of the engineer in charge of the locomotive.

After a defence had been entered, the defendants applied un- sec. 13, subsec. 2 of *The Workmen's Compensation Act*, 16, ch. 125, to the Workmen's Compensation Board for an judication and determination of the question of the plain- 's right to compensation under Part I. of the Act and as to ether the action is one the right to bring which is taken ay by the Act.

Upon this application, an order was made by the Compensa- n Board, on December 5, 1918, declaring that the plaintiff s a right to compensation under Part I. of the Act by rea- n of the accident and that the matter is one in which the ht to bring action for or by reason of such accident is ta- n away by the Act.

Following this order an application was made by the de- ndants to the referee in Chambers, upon notice to the plain- f, to dismiss this action, and an order to that effect was de by him on March 21, 1919.

From this last-mentioned order the plaintiff appealed to a dge in Chambers. The appeal came on before my brother lt and by him the plaintiff was allowed to amend his plead- g so as to raise the constitutionality of the Act.

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This amendment was made in the shape of a reply delivered on May 30, 1919. On June 7 following, the defendants amended their defence alleging that the plaintiff on May 29, 1918, shortly after the accident, made a claim for compensation under the Act, which claim was allowed by the Board and that before action he had received compensation to the amount of $187 and that he is now estopped from making any further claim on account of his said injuries. The amended defence also alleges the order made by the Board of December 5, 1918, and they plead not guilty by statute alleging 6 Geo. V. ch. 125, sec. 13 [*The Workmen's Compensation Act*].

On June 7, the Attorney-General of the province, who is not a party to the action, also filed a statement of defence and counterclaim, alleging the claim made by the plaintiff to the Board, its allowance and payment of compensation, and the order made by the Board on December 5, 1918. It is also alleged that the Act is *intra vires* of the Legislature of Manitoba and has been adopted, homologated, ratified and sanctioned by the statutes of Canada, 8 & 9 Geo. V., ch. 15. The counterclaim asks for a declaration that the Act is constitutional and valid and that the plaintiff's action be dismissed.

It is objected that the Attorney-General had no authority to deliver a defence or counterclaim. Sec. 28 of *The King's Bench Act*, R.S.M., 1913, ch. 46, requires that he be notified before any Act of the Legislature shall be adjudged to be invalid and that upon such question he shall be entitled as of right to be heard, notwithstanding that the Crown is not a party to the action. No provision is made for the Attorney-General in such a case filing a defence or counterclaim, nor is it necessary that he should do so in order to preserve the rights of the Crown. In my opinion the defence and counterclaim of the Attorney-General is unwarranted by the practice and should be stricken out. What with the filing of a reply and amended defence raising the constitutionality of the Act after an order had been made dismissing the action and pending an appeal from such order, there is sufficient that is unusual without further complicating matters by a further unauthorized and unnecessary defence and counterclaim.

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The motion is in form an appeal from the referee but as the question of the constitutionality of the Act was not before him but has been projected into the case since his order now appealed from was made, this motion is not in reality an appeal against any decision made by him.

The first question raised is—Has the plaintiff elected his forum and thereby estopped himself from bringing this action? The defence alleges that he made a claim for compensation under Part I. of *The Workmen's Compensation Act*, that the claim was allowed by the Board and that he has been paid $187 of the compensation so awarded.

It seems to me that the question of whether or not the plaintiff has irrevocably elected to proceed under the Act is one that cannot be disposed of by a summary application to dismiss the plaintiff's action. I have no doubt had the application been made to the learned referee upon this ground alone, he would have refused it, and in my opinion he would have been right in doing so.

The next point is as to the constitutionality of the Act. The sections attacked are 11, 13, 28, 46 to 52, 55, 57, 58, 59, 61 (4) and 70.

It is objected that the Board is by the Act constituted in essence if not in name a superior Court and therefore that the appointing of the Board and its remuneration is, by secs. 96 and 100 of *The B.N.A. Act*, assigned exclusively to the Dominion and a Board appointed by the provincial government is consequently without jurisdiction. The answer to this question will depend upon the powers conferred upon it by the Act.

Sec. 3 of *The Workmen's Compensation Act* provides, that where in any employment to which the first part of the Act applies, personal injury by accident arising out of and in the course of his employment is caused to a workman, his employer shall be liable to provide or pay compensation in the manner and to the extent mentioned in the Act, except where the injury does not disable the workman for a period of at least six consecutive days from earning full wages at the work at which he was employed, and except where the injury is attributable solely to the serious and wilful misconduct of the

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workman unless the injury results in death or serious disablement.

Sec. 11 says that,

No action shall lie for the recovery of the compensation but all claims for compensation shall be heard and determined by the board, without the intervention of counsel or solicitors on either side except with the express permission of the board.

By sec. 13 (amended 1919, ch. 118, sec. 8):

The right to compensation provided by this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for or by reason of any accident which happens to him while in the employment of such employer. * * and no action in any court of law in respect thereof shall * * lie.

Subsec. 2, of sec. 13, provides for the case where a workman has brought an action at law for compensation. It says:

Any party to such action if brought may apply to the board for adjudication and determination of the question of the plaintiff's right to compensation under this Part and as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive.

Subsec. 4 of sec. 61 deals with the same subject. It says:

Where an action in respect of an injury is brought against an employer by a workman or a dependent the board shall have jurisdiction upon the application of the employer to determine whether the workman or dependent is entitled to maintain the action or only to compensation under this Part and, if the board determines that the only right of the workman or dependent is to such compensation, the action shall be forever stayed.

Sec. 18 and its several subsections deal with the manner in which, and time within which, notice of an accident must be given, but says that

failure to give the prescribed notice or any defect or inaccuracy in a notice shall not bar the right to compensation if in the opinion of the board the employer was not prejudiced thereby or if the board is of opinion that the claim for compensation is a just one.

Sec. 29 (amended 1919, ch. 118, sec. 14) provides that where a claim for compensation is made notice in writing shall be given to an employer carrying his own insurance or to the insurance company and sets out the form of notice. It requires the employer or insurance company so notified to in turn notify the Board within six days if they desire to be pres-

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ent at the hearing and determination of the claim. If no reply is received the Board may proceed *ex parte*

to determine the question of the right of the workman or his dependents to compensation and shall make an order for any compensation awarded as hereinafter provided.

If an affirmative reply is received, a date shall be fixed

and the board shall, after fixing a time for such hearing and giving due notice thereof, proceed to hear and determine the matter of the said claim, and the amount of the compensation, if any, to be awarded, and shall make an order for payment of any compensation awarded as hereinafter provided.

Secs. 33 to 36 prescribe the scale of compensation to dependents when the accident has resulted in the death of the workman.

Secs. 37 to 43 deal with the scale of compensation to be paid in cases of permanent, or temporary, total or partial disability and the rules for determining the same.

The following sections dealing with the powers of the Board may also be noted:

Sec. 52 [amended by 1919, ch. 118, sec. 22]. The board shall have the like powers as the Court of King's Bench in Manitoba or a judge thereof for compelling the attendance of witnesses and of examining them under oath, and compelling them to answer questions and compelling the production of books, papers, documents and things.

Sec. 57. (1) The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority, or discretion is conferred upon the board, and the action or decision of the board thereon shall be final and conclusive and shall not be open to question or review in any court and no proceedings by or before the board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any court.

(2) [Amended by 1919, ch. 118, sec. 23]. Without hereby limiting the generality of the provisions of sub-section (1), it is declared that the exclusive jurisdiction of the board shall extend to determining:

(*a*) The existence and degree of disability by reason of any injury;

(*b*) The permanence of disability by reason of any injury;

(*c*) The degree of diminution of earning capacity by reason of any injury;

(*d*) The amount of average earnings;

(*e*) The existence, for the purpose of this Part, of the relationship of any member of the family of a workman as defined by this Act;

(*f*) The existence of dependency;

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(*g*) Whether or not any industry or any part, branch or department of any industry is within the scope of this Part, and the class to which any industry or any part, branch or department of any industry within the scope of this Part should be assigned;

(*h*) Whether or not any workman in any industry is within the scope of this Part and entitled to compensation thereunder.

58. The board may award such sum as it may deem reasonable to the successful party to a contested claim for compensation or to any other contested matter as compensation for the expenses he has been put to by reason of or incidental to the contest and an order of the board for the payment by an employer of any sum so awarded, when filed in the manner provided by section 60, shall become a judgment of the court in which it is filed and may be enforced accordingly.

60. [Amended by 1919, ch. 118, sec. 24]. An order of the board for the payment of compensation by an employer or insurance company or underwriter, who is liable to pay the compensation and any other order of the board for payment of money made under the authority of this Part or a copy of any such order certified by the secretary to be a true copy may upon payment of a fee of one dollar be filed in the Court of King's Bench for Manitoba and when so filed shall become a judgment of that court and may be enforced accordingly.

The Act provides (see secs. 66 to 69J. of 1919 amendments) for the establishment of an accident fund by an assessment and levy by the Board upon each class of employers rated upon the payroll, or in such other manner as the Board may deem proper, sufficient to meet all amounts payable from the accident fund during the year for which the levy is made including medical aid; to provide capitalized reserves sufficient to meet periodical future payments of compensation and to provide a general reserve fund to meet losses arising from any disaster or other circumstance.

It also provides for the establishment of an "Administration Fund" (sec. 77) by an assessment of a sum not to exceed seven and one-half per cent of the premiums charged by insurance companies or underwriters who have issued policies insuring the payment of the compensation which might become payable by an employer or which the employer would have been charged had he insured against his liability to pay compensation. Sec. 65 provides for a contribution to this fund from the consolidated revenue fund of the province such annual sum as the Lieutenant-Governor in Council may direct to assist in defraying the expenses of administration.

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Secs. 46 to 51 provide for the constitution of the commission, its appointment by the Lieutenant-Governor in Council, the salaries of the members, their tenure of office, and their payment, together with the other expenses of administration, out of the administration fund.

The commission is to consist of a commissioner and two directors to be called "The Workmen's Compensation Board" and is created a body corporate. The commissioner is to hold office during good behaviour but may be removed at any time for cause and his salary is to be $6,000 per year. The directors are to be paid $1,000 each per annum with no fixed tenure of office.

If the establishment of this Board, the appointment and the payment of its members and the assessment and payment of compensation is within the powers of the province, such power must be derived from sec. 92, subsecs. 2, 13, 14 or 16 of *The B.N.A. Act.*

Under these subsections the province may exclusively make laws relating to: (1) Direct taxation within the province in order to the raising of a revenue for provincial purposes; (2) Property and civil rights in the province; (3) The administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and criminal jurisdiction and including procedure in civil matters in these courts; and (4) Generally all matters of a merely local or private nature in the province.

In view of the decision of the Judicial Committee in *C.P.R. v. Workmen's Compensation Board* [1919] 3 W.W.R. 167, 48 D.L.R. 218, otherwise known as *The "Sophia" Case,* reversing the majority judgment of the Court of Appeal of British Columbia, [1919] 3 W.W.R. 167, 47 D.L.R. 487, it must, I think, be held that the enactment of legislation for the establishment of a commission or board with the powers above outlined is within the competence of the Legislature of the province. That case decides that the assessments upon employers for the purposes of the accident fund is direct taxation for provincial purposes and that the right to compensation given

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by the Act to an employee is covered by property and civil rights within the province.

I cannot bring myself to doubt that it is also competent for the province to provide, as this Act has done, for the creation of a fund by an assessment against the employers for payment of compensation according to a specified scale to an injured employee or to his dependents in the event of the accident resulting in death, and to take away from him or them the right to proceed for compensation in any other way. Such legislation has to do with civil rights within the province and does not entrench upon the powers of the Dominion nor any of the subjects reserved to it under sec. 91.

In my opinion secs. 11, 13, 28, 52, 55, 57, 58, 59, 61 (4) and 70, are all *intra vires* of the province, but it by no means follows that the appointment and payment of the members of the tribunal by which these provisions are to be made effective also belong to the province.

In *In re Small Debts Recovery Act,* 12 Alta. L.R. 32, [1917] 3 W.W.R. 698, at p. 699, 37 D.L.R. 170, Chief Justice Harvey of Alberta, succinctly deals with the power of the province to create Courts, as follows:

> There is no doubt, that it may create such tribunals, and under the scheme of confederation it is the sole judge of the need for such tribunals. On it alone is imposed the burden of and responsibility for the administration of justice, and when in its wisdom it has determined that certain tribunals are necessary for the due administration of justice and has created them if it has not the right to make these tribunals effective by the appointment and payment of the proper functionaries it is clearly the duty of the Dominion to assume that burden * * *.

Even if the Workmen's Compensation Board provided for by the Act is, as was argued, a superior Court, its constitution, organization, jurisdiction and power is within the competence of the province; and were it not that the power of appointing Judges of superior Courts is reserved to the Governor-General, by sec. 96 of *The B.N.A. Act,* that power would also belong to the province.

Then, is this Board a superior Court? If it is in essence no matter by what name it may be designated the appointment of its members, their tenure of office, and the payment of their

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aries are by secs. 96, 99 and 100 of *The B.N.A. Act*, re-
ved to the Dominion, and all acts performed by a Board
ose members were appointed by the Lieutenant-Governor
Council would be without jurisdiction.

This question was not raised or dealt with in *The "Sophia"*
se. The point there was whether sec. 8 of the British Col-
bia Act, which is the same as sec. 5 of the Manitoba Act,
s *ultra vires* of the Legislature in that it provided for pay-
nt of compensation to the dependents of seamen who lost
ir lives in foreign waters.

The same observation may be made with respect to
V.R. *v. Wilson*, 29 Man. R. 193, [1918] 3 W.W.R.
0, which involved the right of the Board to make
award against an employer without notice. Two cases
ich discuss the principle involved here are *Colonial*
vestment & Loan Co. v. Grady, 8 Alta. L.R. 496,
V.W.R. 995, 31 W.L.R. 575, 24 D.L.R. 176, and *Re Public*
ilities Act, Winnipeg v. Winnipeg Elec. Ry., 26 Man. R.
4, [1917] 1 W.W.R. 9. In the former the Court of Ap-
l of Alberta held that a provincial statute which purported
confer upon a Master of the Court the powers of a Judge
respect of actions for the enforcement of mortgages and
reements for sale of lands was in conflict with the appointive
wer of sec. 96 of *The B.N.A. Act* and therefore *ultra vires*
provincial Legislature. Mr. Justice Stuart, who gave the
lgment of the Court, points out that the Act conferred upon
Master powers as full and complete as those held by a
lge of the Supreme Court, which in his discretion he might
ercise. He said at p. 498 (8 Alta. L.R.):

He could, indeed, if he thought best, direct an action to be brought or issue to be tried, but it was still open to him to hear oral evidence as a trial and to give as full and as final a judgment as a Judge of the urt could give, no matter what issue of fact, *e.g.*, fraud or other ground defence, might have been raised. He was to do all this "in the preme Court." It seems to me that it is impossible to avoid the con-sion that by such legislation the Master was constituted in effect a Judge the Supreme Court with jurisdiction limited indeed to its *extent*, but not ts *content*, that is, limited to a certain very important branch of litiga-n, but practically unlimited within that sphere, and subject only with pect to his final judgment to an appeal to the Appellate Division in the

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same way as a final judgment of any ordinary Judge of the Supreme Court.

In the *Public Utilities Case, supra,* the jurisdiction of the Public Utilities Commissioner to make orders requiring the Winnipeg Electric Railway Company to so construct and maintain its tracks and system as to prevent damage to the underground cables and watermains of the city of Winnipeg from electrolysis, and to pay the costs of an investigation conducted by the commissioner was attacked on the ground that the commissioner was in effect constituted a superior Court and that those portions of the Act, which provided for his appointment and payment of his salary by the provincial government, were contrary to sec. 96 of *The B.N.A. Act.* The orders were sustained by an equal division of the Court of Appeal. Chief Justice Howell and Richards, J.A., were of opinion that the question of *ultra vires* was not open and did not consider that question. On the other hand, Perdue, J.A. now Chief Justice, and Haggart, J.A., thought the question was open, and held that the appointment of a commissioner with the jurisdiction conferred upon him by the Act, was *ultra vires* of the province.

There is this distinction between the Public Utilities Commission and the Workmen's Compensation Board, that the former is by the Act creating it, constituted a Court of record whereas, by *The Workmen's Compensation Act* the Board is not in express terms constituted a Court. The fact is not, I take it, conclusive, because a tribunal may be a Court, if it is vested with the powers and jurisdiction of a Court, although not so designated.

The first section of *The Workmen's Compensation Act* which it is argued confers upon the Board the powers and jurisdiction of a superior Court is sec. 11. The material part of that section, for the purpose I am now considering, is that which provides that, "all claims for compensation shall be heard and determined by the board." That, of course, only refers to claims which come within Part I. of the Act. Sec. 4 provides that employers included in schedule 1 shall be individually liable to pay compensation so that the first question the Board must determine is whether the employer belongs to

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ny of the classes named in schedule 1. The next question is whether the claimant is a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business. If he is he cannot claim under Part 1. In either case the claimant would be relegated to whatever rights he might have to compensation apart from the first part of the Act.

Before deciding these or any other questions, the Board must now, by sec. 29 added to the Act in 1919, in consequence of *C.N.R. v. Wilson, supra,* give notice of the claim to the employer if he carries his own insurance or to the insurance company or underwriter. At the time fixed for the hearing, if the employer, insurance company or underwriter, signifies a desire to be present or to give evidence, the Board shall

proceed to hear and determine the matter of the said claim and the amount of the compensation, if any, to be awarded, and shall make an order for payment of any compensation awarded as hereinafter provided.

Sec. 52 gives the Board the same power as the Court of King's Bench, or a Judge thereof, to compel the attendance of witnesses and their examination under oath, and to compel answers, and the production of books and documents.

It seems quite evident that the hearing under sec. 29 is to all intents and purposes a trial of the questions of law and fact involved upon evidence to be adduced before the Board.

Some of the questions of law and fact which, in addition to the preliminary questions already mentioned, the Board shall to determine, are those involved in sec. 3. The Board must determine whether the accident arose out of and in the course of the employment; whether or not it resulted in death or serious disablement; if not, whether it was attributable solely to the serious and wilful misconduct of the workman. The Board's jurisdiction upon these questions is under sec. 57 exclusive, as it is also to determine all the questions set out in subsec. 2 of that section.

Sec. 3 of the Act is in terms the same as sec. 1 of the Imperial Act, 1906. The equivalent section of the English Act has given rise to a great deal of litigation, much of which reached the House of Lords before final determination. The

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cases are collected in *Knocker's Digest of Workmen's Compensation Cases* and in Butterworth's reports.

Speaking of the English equivalent to subsec. 1 of sec. 3, *Dawbarn* in his book on *Employer's Liability* says, at p. 92:

> In this part of the section nearly every word is of vital moment, and certainly every word has been the subject of discussions which in many cases would fill volumes of considerable size. "Employer," "injury," "accident," "arising out of and in the course of," "workman," etc., all have been fiercely fought and to be correctly understood must be read in the light of the decision upon them.

Under the English Act all these questions are left to the decision of the Courts.

Prior to the enactment of this Act, such question could only be determined by the judgment of this Court or of the County Court, after a trial. The Act transfers this jurisdiction to the Board. If the jurisdiction of the Court over this limited but very important field of litigation may thus be taken from the Courts and vested in an official or officials appointed and paid by the province, I can see no reason why the same thing may not be done with respect to any other subject-matter, and so ultimately the whole jurisdiction now exercised by the Court. Before the Board the procedure may be less formal but the essential elements of a trial of the issues of law and fact are the same. There are the parties to the controversy, the claim made for compensation and the denial of liability, the hearing or trial, and the adjudication for or against the claimant, and the formal judgment or order. There seems to be no escape from the conclusion that the Board is constituted a superior Court for the purpose of administering this limited but extremely important branch of litigation.

The order complained of was made under subsec. 2 of sec. 13, which deals with the case where an action at common law or otherwise has been brought. The Board is empowered to make a final and conclusive "adjudication and determination" upon the plaintiff's right to compensation under Part 1 of the Act, and as to whether the action is one the right to bring which is thereby taken away.

Such "adjudication and determination" involves a decision upon the questions of law and fact involved in sec. 3. The

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imant's right to compensation depends upon a finding in favour upon all these questions if there is any issue with spect to them. Such findings cannot in my opinion be made cept in the exercise of the functions of a superior Court dge.

I come, therefore, to the conclusion that the provisions of e Act respecting the appointment and payment of the salary the Board are *ultra vires* of the province as being in conflict th the powers reserved to the Dominion by secs. 96, 99 and 0 of *The B.N.A. Act.*

The defendants and counsel for the Attorney-General relied on the Dominion Act, 8 & 9 Geo. V., ch. 15, as amended st year. All that Act does is to place an employee in the rvice of His Majesty who is injured, or his dependents if has been killed, in the same situation with respect to com-nsation as the employee of any other employer and to pro-le that such compensation shall be determined in the same anner and by the same Board, officer, or authority, as that tablished by the law of the province for determining com-nsation in similar cases, or by such other Board, officer, or thority, or by such Court as the Governor in Council shall om time to time direct. It does not vest, nor would Parlia-ent have the power to vest, in the province the appointment d payment of superior Court Judges.

I may say that I have arrived at this conclusion only after e most careful and painstaking consideration. I believe the ct is serving a good and useful purpose and I should have lt much better pleased if my deliberations had led me to a fferent conclusion.

The order made by the referee will be set aside with costs gainst the defendants.

Order accordingly.

The defendants appealed.

J. B. Hugg, K.C., for the Attorney-General for Manitoba.

T. J. Murray and *A. A. Fraser,* for Attorney-General for Manitoba and defendants, appellants.

W. M. Crichton and *R. W. McClure,* for plaintiff, respondent.

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PERDUE, C.J.M.

ARGUED: 10th February, 1920.
DECIDED: 25th February, 1920.

PERDUE, C.J.M. — This is an appeal from the Chief Justice of the Court of King's Bench. Although the appeal was from an order of the referee in Chambers dismissing the action, the argument before the Chief Justice assumed the form of an attack upon the constitutional validity of *The Workmen's Compensation Act,* 1916, ch. 125, the discussion proceeding as if there had been a case stated under Rules 463-468 raising that question of law. It was claimed by the plaintiff that the Workmen's Compensation Board, as constituted by secs. 46-52 of the Act, and having the powers conferred upon it by secs. 57-59, 61, 70 and other sections, is in essence a Superior Court, that therefore the appointment of the Board and its remuneration came, by secs. 96 and 100 of *The B.N.A. Act,* within the powers exclusively assigned to the Dominion and that an appointment by the provincial Government was consequently without jurisdiction.

A somewhat similar question was raised in *In re Public Utilities Act, Winnipeg v. Winnipeg Elec. Ry.,* 26 Man. R. 584, [1917] 1 W.W.R. 9, in which my brother Haggart and myself were of opinion that that Act was *ultra vires* of the Legislature of the province as infringing the exclusive powers of the Dominion under secs. 96 and 100 of *The B.N.A. Act.* The other Judges, Howell, C.J.M. and Richards, J.A., held that the constitutional question was not before the Court, because sec. 70 of the Act only permitted an appeal upon a question involving the jurisdiction of the commission, and that such appeal must be confined to the question whether the commission had, in making the order appealed from, acted within the powers given to him by the Act.

Some two years later the same constitutional question was considered by the Appellate Division of the Supreme Court of Ontario in *In re Toronto Ry. Co. and City of Toronto,* 44 O.L.R. 381, 15 O.W.N. 244. I am much impressed with the point raised in that case by Sir W. R. Meredith, C.J.O., and stated by him as follows:

> The presumption undoubtedly is that *de facto* members of the Board were validly appointed, and it might be a sufficient answer to the conten-

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to say that there is nothing to show that they were not appointed the Governor-General.

here is, however, an insuperable difficulty in the way of the appellant's ess on this branch of the case.

hat it is not open to attack, in a collateral proceeding, the status of a *facto* Judge, having at least a colourable title to the office, and that his are valid, is clear, I think, on principle and authority, and it is clear the proper proceeding to question his right to the office is by *quo ranto* information.

The Chief Justice cites many English, Canadian and Ameri- authorities which bear out his view as above expressed. cites the rule deduced from the cases in the United States, ed in 23 *Cyc.* 621, as follows:

he right of a *de facto* judge to hold his office is not open to question, are his acts subject to attack in a collateral proceeding. These being ters which can only be inquired into in a proceeding to which he is a y.

All the other Judges of the Appellate Division agreed with view taken by the Chief Justice.

From this decision an appeal was taken to the Judicial Com- tee of the Privy Council, who delivered their judgment on uary 1920 [1920] 1 W.W.R. 755. A copy of this judg- nt has been furnished to us. The Judicial Committee allow- the appeal on a ground which was quite distinct from the stitutional question. This latter question was argued,* but, ir Lordships state, it was unnecessary for them to consider in view of their decision upon the other point.

The intention of *The Workmen's Compensation Act* is to vide means for securing speedy compensation to workmen o receive injury by accident arising out of and in the course their employment. In the cases covered by the Act the em- yer is liable to pay the compensation. In order to assure the workmen or their dependents payment of such com- nsation as may be awarded, every employer is required by Act to file with the Board a policy of insurance in form isfactory to the Board, providing for payment to the Board the compensation which may become payable by the em-

* It would seem that the question was not argued. See report of the gment of the Judicial Committee of the Privy Council [1920] 2 W.W.R. , at p. 761.

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ployer; unless the Board, with the approval of the Lieutenant-Governor in council, permits an employer to carry his own insurance (sec. 71). One purpose of the Act is to afford prompt financial assistance to an injured workman. Another purpose is to enable him to recover reasonable compensation without the expense of litigation and the delay incident thereto.

Sec. 3 of the Act declares that:

> Where in any employment to which this Part applies, personal injury by accident arising out of and in course of the employment is * * * caused to a workman, his employer shall be liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned, except, &c.

The exceptions are (a) where the injury does not disable the workman for more than six days, and (b) where the injury is attributable to the serious and wilful misconduct of the workman, unless death or serious disablement results. In some cases not only "the employer" but also the principal who has engaged "the employer" to perform the work is liable to compensate the workman for injury sustained in the execution of the work (sec. 9). The administration of the Act is committed to The Workmen's Compensation Board which is declared to be a body corporate consisting of a commissioner and two directors, all of whom shall be appointed by the Lieutenant-Governor in council (8 Geo. V., ch. 105, sec. 6). No special qualification of any kind is required of the members. It is not necessary under the Act that any member of the Board should be a lawyer or should possess any legal training. To the Board so constituted the Legislature has entrusted exclusive jurisdiction to examine into, hear and determine all matters and questions arising under Part I of the Act (which, with a few exceptions, applies to employment in general). The action or decision of the Board on any matter or thing in respect of which any power or authority is conferred upon the Board shall be final and conclusive and shall not be open to question or review in any Court and no proceedings of the Board shall be restrained by injunction, prohibition or other process in any court or be removable by *certiorari* or otherwise into any Court (sec. 57). The Legislature in fact makes the Board the exclusive judges of law and

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t in all questions arising under Part I. of the Act. By sec. the right of compensation provided by Part I. of the Act ll be in lieu of all rights of action by the workman or his endents by reason of any accident to the workman and no on in any Court of law in respect of it shall thereafter lie. subsec. (2) of sec. 13 any party to such action if brought y apply to the Board for adjudication and determination of question of the plaintiff's rights to compensation under rt I. and as to whether the action is one the right to bring ich is taken away by that Part, "and such adjudication and ermination shall be final and conclusive." It is under this ion that the order or certificate of the Board was made de- ring that the plaintiff had a right to compensation under rt I. of the Act by reason of his accident and that the mat- was one in which the right to bring an action was taken ay by the Act. The motion to dismiss this action was nded upon the certificate of the Board that the plaintiff has ght to compensation under Part I. of the Act and that the tter in question was one in which the right to bring an ion for, or by reason of, such accident was taken away by Act.

Similar statutes have been in force for several years in other vinces of Canada and the jurisdiction of a provincial Leg- ture to enact such statutes has not been successfully attack-

The powers of the Board under *The Workmen's Com- sation Act* of Ontario, 4 Geo. V., ch. 25, were considered the Appellate Division in *Murphy v. City of Toronto,* 43 .R. 29, 14 O.W.N. 158, 45 D.L.R. 228.

In that case the Workmen's Compensation Board notified defendant corporation, which was indebted to the plaintiff, ontractor, for work done, to pay the amount of an assess- nt by the Board to the Board out of the moneys due by the endant to the plaintiff. The defendant paid the assessment the Board. The action was brought by the plaintiff to re- er the amount from the defendant. It was held by Clute, (41 O.L.R. 156, 14 O.W.N. 11, 45 D.L.R. 228) that the urt had jurisdiction to inquire into the proceedings of Board to ascertain whether the defendant had brought elf within the protection of the Act. It was also

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held that after a decision has been rendered and a valid as ment made by the Board, it is final and not subject to re in the Courts. The trial Judge in that case allowed an in to be made and evidence to be taken to show that a assessment had been made. The result of the investig was that it was found by the Judge that the assessment b Board was valid. The decision of the trial Judge was u mously affirmed by the Appellate Division (43 O.L.R. 2 O.W.N 158, 45 D.L.R. 228). The constitutional valid the Act was not specially argued but was assumed both b trial Judge and the Appellate Court. The Manitoba *W men's Compensation Act* is similar in effect to the corres ing Ontario statute.

C.P.R. v. Workmen's Compensation Board, (The "Sc Case) [1919] 3 W.W.R. 167, 47 D.L.R. 487, dealt wi corresponding Act in British Columbia. The Court of A held that the Act was *ultra vires* of the Legislature of B Columbia in so far as it purports to warrant the paym compensation to seamen, or their dependents, for accide death by accidents, on ships in foreign waters. This de was reversed by the Judicial Committee of the Privy Co *Workmen's Compensation Board v. C.P.R.*, [1919] 3 W 167, 48 D.L.R. 218. In giving the judgment of the Council, Viscount Haldane said:

> It is not in dispute that the persons employed by the respondei pany with reference to whose dependents the present question is come within the conditions under which the enactment purporte applicable to them. Nor can it be successfully contended that th ince had not a general power to impose direct taxation in this form respondents if for provincial purposes.

It was held, following *Bank of Toronto v. Lambe*, 1 Cas. 575, 56 L.J.P.C. 87, that the province could impose taxes on companies carrying on business within the pr even where the companies were incorporated under Do statute. Viscount Haldane dealt with other contentions respondents that the Act was *ultra vires* and overruled The question as to the power of the province to appo Board was not raised, but, apart from that single ques must regard the decision as an authority for the validity Act in general.

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The right of compensation under the Act was regarded by iscount Haldane as the result of a statutory condition of the ntract of employment made with a workman resident in the ovince, for his personal benefit and for that of members his family dependent upon him (pp. 178-180 [1919] 3 .W.R.). I would refer also to *Citizens Insur. Co. of Can-a v. Parsons*, 7 App. Cas. 96, at pp. 109-110, 51 L.J.P.C. 11.

Taking *The Workmen's Compensation Act* at large, I think e power to enact such legislation was conferred on the Leg-ature of the province by sec. 92 of *The B.N.A. Act*. In *odge v. Reg.*, 9 App. Cas. 117, at p. 132, 53 L.J.P.C. 1, it was id that *The B.N.A. Act* conferred on a provincial Legisla-re

thority as plenary and as ample within the limits prescribed by sec. 92 the Imperial Parliament in the plentitude of its power possessed and uld bestow. Within these limits of subjects and area the local legis-ure is supreme.

The same view is expressed in *Dobie v. The Temporalities oard*, 7 App. Cas. 136, at p. 146, 51 L.J.P.C. 26, and *Mari-ne Bank of Canada v. Receiver General of New Brunswick* 892] A.C. 437, at pp. 441-443, 61 L.J.P.C. 75.

There may be certain clauses in *The Workmen's Compen-tion Act* the validity of which may be open to question, but is not necessary to discuss or refer to them on this appeal, ne Board as created by secs. 46-52 is an administrative body d not a Court of justice. It is not, in my opinion, a Su-rior Court. Some provisions of the Act are of a drastic, most of a revolutionary, character. But the Courts have thing to do with the policy of the legislation. The func-n of interpreting the statute lies with the Court of King's nch as the High Court of this province, subject, of course, appeal from that Court: *27 Halsbury*, 126-127, and cases ere cited. If the Board exceeds its jurisdiction or acts with-t jurisdiction it may be restrained: *C.N.R. v. Wilson*, 29 an. 193, [1918] 3 W.W.R. 730. But as long as the Board ts within its jurisdiction it is the duty of the Courts to lend eir assistance when necessary so as to carry out the purpose d intention of the Act.

With great respect, I would allow the appeal and restore the der dismissing the action.

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CAMERON, J.A.—This is an action for damages brought by the plaintiff, a carpenter, against the defendants, contractors, for personal injuries sustained while in the defendants' employment. It is alleged by the plaintiff in his statement of claim, issued November 27, 1918, that his injuries were due to the defendants' negligence and, alternatively, to the negligence of the defendants' foreman to whose orders he was bound to conform.

It is alleged in the defence, after making certain denials of the plaintiff's allegations, that the accident happened on May 29, 1918, and that on May 29, 1918, the plaintiff filed his claim with the Workmen's Compensation Board in the form of an affidavit and that his claim was duly allowed and payments made in respect thereof; also that on November 26, 1918, an application was made by the defendants to the Board for adjudication and determination of the right of the plaintiff to compensation under the Act and that the Board on December 5, 1918, declared that the plaintiff's right to compensation was within the Act and the right of action in respect thereof was taken away.

An application was made to the referee to dismiss the action and, on March 21, 1919, he made an order dismissing the action, holding that the order made by the Board December 5, 1918, was final. An appeal from this order was made to Mr. Justice Galt, who gave the plaintiff leave to amend by raising the question of the validity of the Act. Thereupon the plaintiff, May 30, 1919, replied to the amended defence by making further allegations, amongst them one that the Act in question was *ultra vires* of the Legislature, more particularly with respect to certain specified sections.

Subsequently this appeal was heard before the Chief Justice of the King's Bench when the question of the validity of *The Workmen's Compensation Act,* ch. 125, 6 Geo. V, or rather of certain sections of that Act, was argued. As a result of the informal procedure thus adopted, an order was made or judgment pronounced by the Chief Justice in which it was adjudged and declared that secs. 46 to 51 inclusive of the said Act

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e *ultra vires* of the Legislature of the Province of Manitoba, especially when considered in relation to the other provisions of the Act and the wers conferred upon the Workmen's Compensation Board by the provions of the Act.

From this order or judgment the defendants appeal and on e argument before us it was agreed by counsel for all parties, cluding counsel representing the Attorney-General, that the estion of the validity of the Act should be argued and determined as if regularly brought before the Court under sec. 6 of *The King's Bench Act,* R.S.M., 1913, ch. 46.

The Workmen's Compensation Act, ch. 125, 6 Geo. V, repealed *The Employers' Liability Act* and *The Workmen's mpensation Act,* chs. 61 and 209, of the Revised Statutes d provided a new method of determining and paying comnsation to workmen for injuries sustained in their employent. It is limited to workmen in certain specified industries which additions may be made by the Board constituted by e Act. Part II of the Act deals with employers' liability, t is a different subject and does not affect the question before

The Act enlarges the right to compensation for personal uries from accident arising out of, and in the course of, ployment to all cases excepting those where the workman not disabled for a period of at least six consecutive days d excepting where the accident is attributable solely to the ious and wilful misconduct of the workman "unless the iny results in death or serious disablement." No action lies r the recovery of compensation but all claims for such comnsation are to be heard and determined by a Board which is eated by the Act.

By sec. 13 it is provided that the right to compensation proled by the Board shall be in lieu of all actions and rights of ions against the employers of workmen of the designated sses and by subsec. (2) that any party to an action may ap to the Board for adjudication and determination of the intiff's right to compensation and as to whether the action one the right to bring which is taken away by the Act and ch adjudication and determination shall be final and consive. This subsection was amended in 1919, ch. 118, 9 o. V, but the amendment is immaterial here.

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The Board consists of a commissioner and two directors to be appointed by the Lieutenant-Governor in Council, and shall be a body corporate. It is given the like powers as the Court of King's Bench or a Judge thereof, for compelling the attendance of witnesses, examining them under oath and compelling the production of documents.

It is provided that an accident fund shall be created to be furnished by contribution to be made by insurance companies and by employers carrying their own insurance, which may, if found necessary, be supplemented out of the consolidated revenue fund. Employers are to file statements showing wages earned by employees and a policy of insurance satisfactory to the Board is to be filed with such statements. The Board may examine the books of employers and may inspect their premises to see if satisfactory precautions against accidents have been taken. But to ascertain the scope of the Act reference must be made to the whole Act.

By sec. 57 the jurisdiction of the Board is made exclusive as to matters arising under the Act and its decisions are made final and conclusive and shall not be open to question or review in any Court and its proceedings shall not be restrained by injunction, prohibition or other process or proceeding in any Court or removable by *certiorari* or otherwise into any Court. The Board is given the power to rescind, alter or amend its decisions or orders. Provision is made for the creation of an accident fund out of contributions by insurance companies and underwriters, and by employers carrying their own insurance.

Sec. 57 is amended by 6 Geo. V, ch. 118, sec. 23, whereby subsec. (2) of said sec. 57 is repealed and a new subsection, retroactive in its operation, is substituted. Without limiting the generality of the provisions of subsec. (1) it declares the exclusive jurisdiction of the Board shall extend to determining the existence and degree of disability, the permanence of the disability, the effect of the injury on earning capacity, average earnings, relationship of workman to his family, dependency, whether any industry within scope of Act, and "whether or not any workman in any industry is within the scope of this Part [Part I of the Act] and entitled to compensation thereunder."

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The authority of the provincial Legislature to make laws specting the matters involved in the legislation in question is be found amongst the classes of subjects assigned to its ex-sive jurisdiction by sec. 92 of *The B.N.A. Act*, and more rticularly by subsec. 13 of sec. 92, concerning "Property and vil Rights." Incidentally there arises also the consideration subsec. 14

Administration of Justice in the Province, including the Constitution, intenance and Organization of Provincial Courts, both of Civil and minal Jurisdiction, and including Procedure in Civil Matters in those urts.

There is no provision in sec. 91 of *The B.N.A. Act* (which fines the exclusive legislative authority of the Parliament of nada) that is affected by this Act. No question whatever ses that it encroaches upon the powers of Parliament in the ghtest. There is no provision in sec. 91 or elsewhere in the t that the provincial Legislature shall not make laws res-cting the creation and appointment of Boards or commis-ns or officers who may exercise judicial powers.

Sec. 96 of *The B.N.A. Act* provides:

The Governor General shall appoint the Judges of the Superior, District, d County Courts in each Province, except those of the Courts of Pro-e in Nova Scotia and New Brunswick.

This power of appointment has nothing to do with the minion Parliament and concerns only the powers of the vernor-General. No question, therefore, arises with res-ct to conflict of powers between Parliament and the provin-l Legislature as respectively assigned to them by secs. 91 d 92 of *The B.N.A. Act*. The Act before us is within the thority of the local Legislature under sec. 92. The sole estion is whether its validity is affected by the power of ap-intment reserved to the Governor-General by sec. 96 of the perial Act, with which secs. 99 and 100 are to be read.

The authority of the provincial Legislature and that of the minion Parliament may at times overlap.

Subjects which in one aspect and for one purpose fall within sec. 92 [of *e British North America Act*] may in another aspect and for another rpose fall within sec. 91. [*Hodge v. Reg.*, 9 App. Cas. 117, at p. 130, 53 .P.C. 1.].

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See *Atty.-Gen. for Manitoba v. Manitoba Licenceholders Assn.* [1902] A.C. 73, at p. 78, 71 L.J.P.C. 28. In such a case we are to determine "the true nature and character of the legislation in the particular instance under discussion"—its grounds and design, and the primary matter dealt with—its scope and object—"in order to ascertain the class of subject to which it really belongs," and any merely incidental effect it may have over other matters does not alter the character of the law. (*Russell v. Reg.*, 7 App. Cas. 829, at pp. 839-40, 51 L.J.P.C. 77). Similar considerations may reasonably be invoked in determining the validity of legislation when it is assailed as being apparently repugnant to provisions of *The B.N.A. Act* other than sec. 91.

What then is the scope and object of this legislation? It is contended that the object of the Act in question is to provide a scheme of accident insurance for the benefit of workmen within this province, and that the Board which is created by the Act is not a Court but merely an administrative body designed to carry out effectively its terms.

In *C.P.R. v. Workmen's Compensation Board, (The "Sophia" Case)* [1919] 3 W.W.R. 167, it was held by the Privy Council, on appeal from the Court of Appeal for British Columbia, that the provisions of the *Workmen's Compensation Act*, 1916, (B.C.) ch. 77, were not *ultra vires* of the provincial Legislature for the alleged reason that they warranted payment of compensation to dependents of workmen, coming within the enactment, who may be killed in an accident elsewhere than in the province. The British Columbia Act is similar to that of this province and its validity was impeached on the ground above set forth, but there is no suggestion made throughout that the Act was in confli t with sec. 96 of *The B.N.A. Act.* Yet the Chief Justice of the Court of Appeal says ([1919] 3 W.W.R. at p. 170):

> The Board is both Judge and sheriff. It pronounces judgment and carries it into execution. It is a new Court in substitution to the extent of its jurisdiction, of the ordinary Courts with powers in part judicial and in part ministerial. Its creation is authorized by the powers conferred on the Legislature under said class 13 [of sec. 92 of *The B.N.A. Act*].

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But Mr. Justice McPhillips, who delivered a dissenting dgment, which was upheld in the Privy Council, took the ew (at pp. 174, 175 [1919] 3 W.W.R.)

t the *Workmen's Compensation Act* is in its nature a scheme of insurce or pension scheme, providing compensation to workmen and to their pendents in case of death caused by accident, quite independent of negence, and the obligation is imposed at large upon the employers covd by the Act in favour of the workmen and dependents of workmen fined by the Act.

Viscount Haldane, in giving the judgment of the Privy ouncil, deals with the provisions of the Act and holds (at p. 1 [1919] 3 W.W.R.) that

e right conferred arises under sec. 8 [dealing with accidents outside e province] and is the result of the statutory condition of the contract employment made with a workman resident in the province, for his perıal benefit and for that of members of his family dependent on him. * * * This right arises, not out of tort, but out of the workman's tutory contract, and their Lordships think that it is a legitimate proıcial object to secure that every workman resident within the province o so contracts should possess it as a benefit conferred on himself as a bject of the province.

These views are of the greatest weight in determining the ecise scope of this legislation. Our Act unquestionably eates a scheme of accident insurance and it further imposes statutory condition on the contract of employment in the ses it specifies.

In *Murphy v. City of Toronto,* 41 O.L.R. 156, 14 O.W.N. , 45 D.L.R. 228, it was decided that a decision of the Board der the Ontario *Workmen's Compensation Act,* 4 Geo. V, . 25 (also similar to ours) was final and not subject to reew by the Courts. The Appellate Division rested its decion (43 O.L.R. 29, 14 O.W.N. 158, 45 D.L.R. 228) on sec.) of the Ontario Act (our sec. 57) giving the Board exclusive risdiction in the matter in question and held, agreeing with e trial Judge, that there was no right of action. In this case in the British Columbia cases, no question was raised as to e validity of the legislation, though its provisions were thorughly examined and discussed.

What is the meaning of the term "Superior Court" as used sec. 96? It is pointed out in 9 *Halsbury*, p. 9, that

any bodies are not courts, although they have to decide questions, and in doing have to act judicially, in the sense that the proceedings must be

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conducted with fairness and impartiality; such as assessment committees, boards of guardians, the benchers of the Inns of Court * * * or the General Medical Council.

And at p. 11:

The Superior Courts are the House of Lords, the Judicial Committee of the Privy Council, the Supreme Court of Judicature, the Court of Criminal Appeal, and the Courts of Chancery of the Counties Palatine of Lancaster and Durham, and are all courts of record.

With the changes necessitated by the statutes enacted since 1867, those were Superior Courts as they existed and were present in the mind of the Imperial Parliament when it passed *The B.N.A. Act.* The general conception as to what is a Superior Court with its attendant powers, dignity and prerogatives has not been changed since that time.

In 15 *Corpus Juris,* p. 715, there is the following: "A court is a body in the government to which the public administration of justice is delegated." Similar definitions are given in a footnote. "A tribunal charged as a substantive duty, with the exercise of judicial power." "A tribunal organized for the purpose of administering justice, and presided over by a judge or judges." The term

has been held not to include a master commissioner, a master in chancery, a commission appointed by the court, a public service commission, * * * a board of equalization of taxes, * * * the view being that the word "court" implies a permanent organization for the administration of justice. [*Ibid* 717].

These definitions or expositions of the terms are in accordance with our traditional views of Courts of justice and their meaning is accentuated when the word "Superior" is prefixed.

The opinions stated on this question by Sir John Thompson in various reports made by him as Minister of Justice have been frequently cited. His report on the Quebec *District Magistrates' Act,* 1888, is set out at length in *Lefroy on Legislative Power in Canada,* pp. 141-174, and the terms of the disallowed Act at pp. 142-3. That Act was an attempt on the part of the Quebec Legislature to substitute a provincial Court with provincially appointed Judges for a Superior Court with Dominion appointed Judges. Sir John Thompson comments on the decision of the Privy Council in *Reg. v. Coote,* L.R. 4 P.C. 599, 42 L.J.P.C. 45, holding that that dealt only with the question of conferring power to examine witnesses, etc., al-

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ough a wider construction was placed upon it in *Reg. v. Hor-*
r, 2 Cart. 317. But in a later report Sir John Thompson
udiated the idea that the local Legislatures have no power to
eate Courts of no matter how small jurisdiction, where
dges shall be appointed by the local executives. He main-
ns the view that the words of *The B.N.A. Act* referring to
udges of the Superior, District, and County Courts," include
classes of Judges like those designated and not those which
the passage of the Act happened to bear those names.
froy, Canada's Federal System, p. 562.

Sir John Thompson made a restatement of his position in a
bsequent report (May, 1892), quoted in *Lefroy, Canada's*
deral System, p. 566, which dealt with the provisions of a
uebec Act empowering the Lieutenant-Governor in Council,
on the report of the railway committee of the executive
uncil, to cancel railway charters in certain cases. He held
at the legislation might be objectionable as conferring on the
lway committee powers generally reposed in legal tribunals,
t adds that "it seems clear that a legislature may invest other
dies than the Courts with such powers and functions without
ceeding its jurisdiction." Mr. Lefroy remarks that the
inister is here speaking of the power of the provincial Legis-
ure to create a special tribunal for the determination of a
ecial matter and not of the power to confer general jurisdic-
n.

It must be remembered that Sir John Thompson and other
inisters of Justice who have discussed this subject were
aling with provincial Acts from the point of view of their
sallowance and that the power of disallowance may be exer-
sed upon grounds of policy and not necessarily upon the
ound of *ultra vires,* which is properly a question for the
urts. In reality if a provincial Act is *ultra vires* there is no
ed to disallow it. But whatever his point of view, and his
inion though extra-judicial is entitled to weight, he evidently
nsidered it was within the power of a local Legislature to
eate bodies other than Courts with the powers and functions
ually reposed in legal tribunals for special purposes.

In *In re Toronto Ry. Co. & City of Toronto,* 44 O.L.R. 381,
O.W.N. 244, an order made by the Ontario Railway and

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Municipal Board required the Toronto Railway Company to place a certain number of cars in operation and a further order was made requiring the company to pay a sum of money as penalty for non-compliance with the first order. On appeal Chief Justice Meredith dealt with the objection that the order of the Board had no validity; that the Board is a "Superior Court" within the meaning of sec. 96 of *The B.N.A. Act*, and that its members had no jurisdiction. He held that the presumption is that *de facto* members of the Board were validly appointed, and that it might be a sufficient answer to say there was nothing to show that they were not appointed by the Governor-General. He says at p. 388 (44 O.L.R.):

> That it is not open to attack, in a collateral proceeding, the status of a *de facto* Judge, having at least a colourable title to the office * * * is clear, I think, on principle and on authority, and it is also clear that the proper proceeding to question his right to the office is by *quo warranto* information.

At p. 391 (44 O.L.R.) he expresses the opinion that the Board is an administrative body, having, as incidental to the performance of its administrative functions and the exercise of its administrative powers, jurisdiction to construe contracts and further that if the Board be a Court it is not a Superior Court within the meaning of sec. 96 of *The B.N.A. Act*, and he points to provisions in the Ontario Act warranting this view, not a few of which are to be found in the Act before us. See pp. 395, 396 (44 O.L.R.). He concludes his judgment thus, at p. 397 (44 O.L.R.):

> According to the rule which has been admittedly laid down, that in considering a question as to the constitutional validity of a provincial enactment, it is the duty of the Court "to make every possible presumption in favour of such legislative acts, and to endeavour to discover a construction of *The British North America Act* which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it." (per Strong, J., in *Severn v. The Queen*, [1878] 2 Can. S.C.R. 70, 103), we ought, in my opinion, to hold that in *The Ontario Railway and Municipal Board Act*, 1906, the Legislature must be taken to have constituted a tribunal, the members of which should be appointed under its authority as provided by sec. 4 (2), rather than that the Legislature created a Superior Court and usurped an authority which it did not possess, but which was vested in the Governor-General.

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Maclaren, Magee and Hodgins, JJ.A. agreed with the Chief tice and Ferguson, J.A. says, at p. 398 (44 O.L.R.):

s I read *The British North America Act*, the designation *Superior* as ied to a Court means a Court, other than County and District rts, in which is vested the right and power to control, regulate, res- n, or review the acts and proceedings of some other Court.

For this and the reasons assigned by the Chief Justice, he eed with the other members of the Court in dismissing the eal.

On appeal to the Privy Council [1920] 1 W.W.R. , the judgment of the Appellate Division was re- sed on the ground that the wording of the On- io Act that the penalties therein prescribed must imposed by the Railway Board "for the purpose enforcing compliance" with its orders must be taken to er to process for procuring specific performance and, fur- r, that, the Act prescribing the penalties having been passed er a breach of the first order had occurred, it could not be posed the Legislature passed it without intending some ther allowance of time to remedy the breach as that would r too great a resemblance to *ex post facto* legislation. Their rdships' conclusion, therefore, was that the order appealed m was not authorized by the Act. A still further ground stated to the effect that in the proceedings before the Board claim for penalties was made, nor was the question referred until judgment was delivered. As to the other point, that Board must be regarded as a "Superior Court," Viscount ve, who delivered the judgment of the Judicial Committee. p. 761 ([1920] 1 W.W.R.) says:

This question was fully considered by the Supreme Court [of Judicature Ontario] and was decided by that Court against the appellants

t he points out that in consequence of the view of their Lord- ips on other points it became unnecessary for them to con- der it and it was not argued before them and they express no inion on it.

Counsel called attention to certain characteristics of a Court hich this Board does not possess. These are, of course, not dividually or, perhaps, collectively, conclusive, but they row light on the subject as indicating the intention of the

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Legislature and the object of the legislation. The Board is not declared to be a Court. It has no seal as is usual in the case of Courts. Its orders are not enforceable until registered in the King's Bench. They are not given by the Act the power of enforcement such as ordinarily exists to compel obedience to a Court order. There is given no power to commit for contempt. The provisions of the Act, taken as a whole, do not contemplate a litigation between parties but rather an adjustment of claims by the Board against a fund. There also exist under the Act what may be called positive attributes which are inconsistent with the idea of the Board being a Court. It is a body corporate and is given the right to bring an action and to take proceedings before magistrates. It is given the power to inspect premises and direct alterations to be made thereon and other powers at variance with those usually exercised by Courts. These and other characteristics apparent on perusal of the Act are in opposition to the contention that this Board is a Court and point to the conclusion that it is merely an administrative body created with the powers deemed necessary to carry out effectively the insurance scheme which is the object of the Act. The observations of Chief Justice Meredith on this matter to which I have referred are most instructive.

I cannot accede to the contention that the Board, merely because it is given, to a limited extent, certain powers usually exercised by judicial tribunals, which limited powers are necessary for and incidental to the due administration of the insurance scheme contemplated by the Act, is therefore a Superior Court. Similar powers have been freely bestowed upon provincial officers and authorities. It has been held that provincial Legislatures have jurisdiction to pass laws for the appointment of justices of the peace, whose powers are largely judicial. In the same category we have the officers under R.S.M., 1913, ch. 171, *The Real Property Act,* coroners, arbitrators, assessors, Courts of revision and commissioners to make inquiries concerning public matters (Ch. 34, R.S.M., 1913). All these provincial authorities are clothed with powers that are more or less judicial.

An objection taken to the validity of the Act in the judgment appealed from and on the argument is based on sec. 3,

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ich provides for determination by the Board whether an cident arose out of and in the course of employment. It is inted out that these questions under the English statutes are erved for the Courts, and such was the case here before s Act. It is argued that if the jurisdiction of the Courts n thus be limited, such limitation cannot be indefinitely ex-ded. But can there be any doubt about that? The con-tution, maintenance and organization of the Courts is ex-sively within the powers of the local Legislature. The right enact implies the right to repeal. The powers of the Court King's Bench are derived from *The King's Bench Act* and e Legislature that passed it can surely limit, modify or repeal

That the powers of this Board could be exercised by the gislature itself cannot be doubted. The executive power of e Legislature is co-extensive with its legislative power. ere is nothing to prevent the Legislature delegating its ex-utive power to creating a Board to do what it itself could within the ambit of its jurisdiction.

I am strongly inclined to the view, and I am strengthened in by Chief Justice Meredith's judgment in the Ontario case ferred to, that this legislation, assuming that it does create Court as contended, is still *intra vires* of the provincial Legis-ure. It is the only Legislature that can constitute a pro-ncial Court. Neither the Dominion Parliament nor the Gov-nor-General has the power. It is only the appointment of e Judge that can be questioned and that is a matter outside e legislation altogether and does not affect the validity of the gislation. If the Act creates a Court and is therefore invalid ould the appointment of a Judge by the Governor-General ve the effect of validating that which was theretofore invalid d void? I cannot see it. But in the view I take it is not cessary to discuss this aspect of the question raised.

In my opinion the sections of this Act here called in question e valid as a due exercise of the power of the Legislature to eate a special body or tribunal for the adjustment and de-rmination of matters necessarily and incidentally arising in e administration of the system of insurance which the Legis-

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lature intended to create. With that view of the Board's powers and functions it seems to me impossible to bring it within the meaning of the term "Superior Court" as that term is used in sec. 96.

I have not attempted to deal with all the numerous cases or citations more or less relevant brought to the attention of the Court. But this Act has been in force in this province since 1916, and similar Acts in other provinces for a longer period and now for the first time we have the question of their validity under sec. 96 brought before the Courts. Every presumption is to be made in favour of the validity of the legislation and in my judgment there was no argument presented to the Court that was cogent enough to rebut or shake that presumption.

HAGGART, J.A. concurred with Perdue, C.J.M.

FULLERTON, J.A.—This appeal raises the question of the validity of secs. 46 to 51 of *The Workmen's Compensation Act*, being ch. 125 of the statutes of Manitoba, 1916, as amended by ch. 105 of 1918, and ch. 118 of 1919.

These sections deal with the appointment by the Lieutenant Governor in council of a commission for the administration of Part I of the Act.

The learned Chief Justice of the Court of King's Bench, from whose judgment this appeal is taken, held that the sections in question were *ultra vires* of the provincial Legislature as being in conflict with the powers reserved to the Dominion by sec. 96 of *The B.N.A. Act*, which provides for the appointment by the Dominion of Superior, District and County Court Judges.

While the Board is not in terms declared by the Act to be a "Superior Court" the contention is that it is by the Act constituted in essence, if not in name, a "Superior Court." In other words, that if the powers and jurisdiction conferred on the Board constitute it a Court the fact that it is not in terms called a Court is immaterial.

The several sections of the Act conferring jurisdiction are set out at length in the judgment appealed from.

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Speaking generally, the purpose of the Act is to create an "accident fund" for the payment of compensation to injured workmen or their dependents. The fund is created by an assessment levied upon the employers based upon an estimate of the probable amount of the pay-rolls.

Speaking of the British Columbia *Workmen's Compensation Act,* 1916, ch. 77, which is very similar in its terms to our own, McPhillips, J.A., in the case of *C.P.R. v. Workmen's Compensation Board, (The "Sophia" Case)* [1919] 3 W.W.R. 67, said: [See *ante,* p. 225].

The Act is divided into two parts: Part I, with which we are alone concerned, deals with the subject of compensation; Part II. treats of the rights of workmen who are not entitled to avail themselves of the provisions of Part I.

The tribunal provided for by the Act to carry the provisions of Part I into effect is the Workmen's Compensation Board.

Sec. 46, subsec. 1 (amended ch. 105 of 1918, sec. 6) of the Act is as follows:

> There is hereby constituted a commission for the administration of this part, to be called "The Workmen's Compensation Board," which shall be a body corporate and shall consist of a commissioner and two directors, all of whom shall be appointed by the Lieutenant-Governor-in-Council.

In order to effectually carry out the provisions of Part I. the Board is necessarily endowed with certain judicial powers and it is the possession of these powers which is said to constitute the Board a "Superior Court."

The learned Chief Justice of the Court of King's Bench in his written opinion, after referring to the fact that sec. 3 of the Act is in terms the same as sec. 5 of the Imperial Act, 1908, and to the fact that an immense amount of litigation had arisen in England in connection with the interpretation and application of that section, goes on to say (*ante,* p. 212):

> Prior to the enactment of this Act, such question could only be determined by the judgment of this Court or of the County Court, after a trial. The Act transfers this jurisdiction to the Board. If the jurisdiction of the Court over this limited but very important field of litigation may thus be taken from the Courts and vested in an official or officials appointed and paid by the province, I can see no reason why the same thing may not be done with respect to any other subject-matter, and so ultimately the whole jurisdiction now exercised by the Court.

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With deference, it appears to me that the error into which the learned Chief Justice has fallen is in assuming that any jurisdiction formerly exercised by the Court of King's Bench or by the County Court has been transferred to the Board.

It is true that the Act takes from the Court jurisdiction in actions brought by workmen who are entitled to compensation under the Act but the jurisdiction thus taken away is not transferred to the Board.

Prior to the passing of the Act a workman who had been injured by negligence could bring action at common law against his employer or under *The Employers' Liability Act*, ch. 61, R.S.M., 1913, whichever the facts warranted.

Where the workman had suffered injury by accident, arising out of and in the course of the employment, he had an alternative remedy by application for compensation under the provisions of *The Workmen's Compensation Act*, ch. 209, R.S.M., 1913, providing his employment was one to which the Act applied. All questions arising in proceedings under the last-mentioned Act if not settled by agreement were to be settled by the arbitration of a committee representative of the employer and his workmen if any such committee existed, otherwise by an arbitrator agreed on by the parties or in the absence of agreement by the County Court. The Judge of the County Court in disposing of any matter under the Act did not exercise the functions of a County Court Judge but acted as an arbitrator.

An appeal was given to the Court of Appeal but, so far as I can discover, the Court of King's Bench was given no jurisdiction whatever. How then can it be said that any jurisdiction formerly possessed by either the Court of King's Bench or the County Court has been transferred to the Board?

Part II. of the Act repeals both *The Employers' Liability Act* and the original *Workmen's Compensation Act* and enacts provisions which to some extent take the place of *The Employers' Liability Act.*

The Board is not given power to try any action either at common law or under Part II. of the Act. Its sole duty is to

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minister the fund for the creation of which the Act makes vision.

Any injured workman who is not entitled to compensation ler Part I. of the Act may take action in the Courts as he ld prior to the passing of the Act.

t is true that the Act confers on the Board certain judicial ctions, but that fact alone is by no means decisive of the stion. Many bodies exercise judicial functions but are not urts, as for example, arbitrators, committees of clubs, etc.

At the argument counsel for the respondent strongly relied sec. 52 of the Act as showing that the Board was in reality Court. That section provides that the Board shall have the powers as the Court of King's Bench or a Judge thereof compelling the attendance of witnesses, etc.

In *Kelly v. Mathers,* 25 Man. R. 580, 8 W.W.R. 1208, 32 L.R. 33, the validity of *An Act respecting Commissioners make Inquiries Concerning Public Matters,* R.S.M., 1913, 34, was called in question.

Sec. 2 of that Act provided that

> he commissioner or commissioners shall then have the same power to orce the attendance of such party or witnesses, and to compel them to evidence, as is vested in any court of law in civil cases.

It was held that the Act was *intra vires* of the provincial gislature.

In *Reg. v. Coote,* L.R. 4 P.C. 599, 42 L.J.P.C. 45, the Privy uncil decided that it was within the competency of the Legature of Quebec to appoint five commissioners empowered investigate the origin of any fires occurring in the cities of ebec and Montreal, to compel the attendance of witnesses, d examine them on oath, and to commit to prison any witsses refusing to answer without just cause.

See also *In re Public Inquiries Act, In re Clement* [1919] W.W.R. 115.

In *In re Toronto Railway Co. and City of Toronto,* 44 L.R. 381, 15 O.W.N. 244, an order was made by the Onio Railway and Municipal Board requiring the Toronto lway company to place in operation upon its system not er than a certain date 100 additional cars.

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Subsequently a further order was made which, after reciting that the former order had not been complied with, required the company to pay to the city corporation a sum of money as a penalty.

The Ontario Railway and Municipal Board was appointed by the Lieutenant-Governor in council under the authority of sec. 5 of *The Ontario Railway and Municipal Board Act*, R.S.O., 1914, ch. 186. Very large powers both judicial and ministerial are conferred on this Board in connection with the operation and maintenance of railways, street railways, telegraphs, telephone systems and public utilities.

Sec. 5, subsec. 4, of the last-mentioned Act gives the Board "all the powers of a Court of Record and [the Board] shall have an official seal and shall be judicially noticed."

Sec. 21, subsec. 4:

> The Board shall, as respects the amendment of proceedings, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction, or otherwise for carrying this Act or any other general or special Act into effect, *have all such powers, rights and privileges as are vested in the Supreme Court.*

The point was taken in this case that the Board was a "Superior Court" within the meaning of sec. 96 of *The B.N.A. Act*, and its members, not having been appointed by the Governor-General, had no jurisdiction to exercise the powers conferred upon the Board by the Act by which it was created.

The Court, consisting of Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A., held that the Board was not a "Court" within the meaning of sec. 96 of *The B.N.A. Act*.

It seems to me that much stronger grounds existed in this case for holding the Ontario Railway and Municipal Board to be a Court than in the present case for holding the Workmen's Compensation Board to be a Court.

If the Board were intended to be a Superior Court one would expect that it would be given the power to enforce its own orders and not be obliged to resort to the Court of King's Bench under sec. 60.

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Again if it were a Superior Court, sec. 52, which gives it the e powers as the Court of King's Bench for compelling the endance of witnesses, etc. would be unnecessary.

The Board is not in terms declared by the Act to be a Court d the provisions of the Act constituting it a body corporate ec. 46) and giving it a right of action against a defaulting nployer (sec. 69E) are entirely inconsistent with the idea at the Board is a Court.

My view is that the Board is not a Court.

For the above reasons I would set aside the order and allow e appeal with costs.

DENNISTOUN, J.A.—The evolution of the law relating to ntracts of employment has been progressive during a num- r of years in this province. First an adaptation of *Lord mpbell's Act* was passed, next an *Employers' Liability Act* hich enlarged the causes of action open to a workman and moved some of the common-law defences which stood in s way. In 1910, *The Workmen's Compensation Act* was ssed which followed closely the English Act of 1906 and ve the workman a right to compensation by reason of his nployment and injury, quite apart from the doctrine of tort, hich had been the pivot upon which previous legislation rned. In 1916, the Act under consideration was passed. It olishes the action in tort on the part of workmen in special nployments and substitutes a claim upon an insurance fund lieu thereof. The scheme of the Act is to provide a fund ways available for the relief of injured workmen of the asses specified without any delays or technicalities. Com- nsation is paid to the workman not by his employer, but by e Board, which makes assessment upon employers in ad- nce of any claims for compensation arising. Upon failure employers to maintain the fund, compensation is payable t of the consolidated revenue fund of the province.

The Legislature has declared that the contract of employ- ent in certain classes of work has attached to it statutory nditions and creates new rights and remedies in substitution r old.

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It has been argued that the Act in question abrogates certain powers of the Courts and transfers those powers to a new Court. In my opinion such is not the case. The jurisdiction of the Court of King's Bench and the County Courts to entertain actions in tort in respect to the claims of certain classes of workmen against their employers is abrogated, but is not transferred to any other tribunal, and there can be no doubt that the Legislature has full power to abolish any right of action in respect to property and civil rights within the province. Certain causes of action, as for example those against trade unions, have been, from time to time, abolished in England, and in like manner certain causes of action, as for example those in question, against employers, have from time to time, been abolished in Manitoba. The statute in question, sec. 13 (1), says: "No action in any court of law in respect thereto shall thereafter lie." The power of the Legislature to so enact is as full as the power of the Imperial Parliament: *Hodge v. Reg.*, 9 App. Cas. 117, 53 L.J.P.C. 1.

The Workmen's Compensation Act of British Columbia was before the Judicial Committee of the Privy Council very recently: *C.P.R. v. Workmen's Compensation Board* (*The "Sophia" Case*) [1919] 3 W.W.R. 167, 48 D.L.R. 218, and was held to be *intra vires* in so far as the general scheme was concerned. It is similar in general outline to the Manitoba Act. The validity of the appointment of the commissioners was not raised before their Lordships and is not referred to by them. Viscount Haldane says, at p. 181 ([1919] 3 W.W.R.) speaking of the Act as a whole and declaring it to be ***intra vires***: "It is in substance a scheme for securing a civil right within the province."

It is not conceivable that a tribunal could be created by the province for the purposes named, without conferring upon that tribunal some judicial functions. Every scheme of insurance calls for the exercise of judicial or quasi-judicial powers by certain officials. An insurance company is called upon daily to determine the rights of claimants under the policies which it issues.

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The identification of the claimant as one of the assured, the roof of his right to compensation as one of a class, and the ssessment of his compensation based upon a wage scale, and ne extent of his injuries, are ordinary administrative acts hich must necessarily be performed; and the adjudication ade in respect thereto can be made as well by an inferior as y a Superior Court, and equally as well by a tribunal which not a Court at all.

The right of a province to create inferior Courts and to ap-oint those who exercise judicial functions therein has been enerally recognized: *In re Small Debts Recovery Act,* 12 lta. L.R. 32, [1917] 3 W.W.R. 698, 37 D.L.R. 170; *Reg. Bush,* (1888) 15 O.R. 398; *Rex v. Sweeney,* 45 N.S.R. 494, 9 C.C.C. 222, 1 D.L.R. 476; *Wilson v. McGuire,* (1883) 2 .R. 118.

The judgment appealed from *(ante* p. 481) referring to the ecision of the Judicial Committee of the Privy Council in .P.R. *v. Workmen's Compensation Board, supra,* sometimes nown as *The "Sophia" Case,* adopts the view that the enact-ent of legislation for the establishment of a commission, or oard, with the powers above outlined, is within the compet-nce of the Legislature of the province. Further that it is ompetent for the province to provide, as this Act has done, or the creation of a fund by an assessment against employers, or payment of compensation according to a specified scale, to n injured workman, or his dependents in the event of death, nd to take away from him or them the right to proceed for ompensation in any other way. Such legislation has to do ith civil rights within the province and does not encroach pon the powers of the Dominion nor any of the subjects re-rved to it under sec. 91 of *The B.N.A. Act.*

The Legislature has set up a special tribunal by which these rovisions are to be made effective, and the judgment appealed rom, finding certain judicial functions conferred upon that ribunal—and for that reason alone—assumes that a Superior ourt has been created which can only be controlled and made perative by the appointment of a Judge by the Governor- Gen-ral under the provisions of secs. 96 to 101 of *The B.N.A. Act.*

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Special tribunals have been created by the province for specia purposes in a number of instances. All of them exercise judi cial functions.

Under *The Small Debts Recovery Act* of Manitoba, 6 Ge V., ch. 101, police magistrates are appointed by provinci order in council to exercise jurisdiction in all claims and de mands for debt whether payable in money or otherwise whe the amount or balance claimed does not exceed $50. Judg ments of the magistrate may be filed in the office of the cle of the County Court for the judicial division in which th action is brought, and thereupon shall be entered as a judg ment of that Court, and execution, garnishing proceeding and certificates for registration against lands, may be issue thereon and enforced according to the ordinary procedure o that Court or of the Court of King's Bench, where applicabl *In re Small Debts Recovery Act, supra.*

Under the provisions of *The Real Property Act,* R.S.M 1913, ch. 171, judicial functions of an extensive characte are exercised by district registrars and particularly under th foreclosure sections of the Act.

Assessors and Courts of Revision under *The Municipal Ac* R.S.M., 1913, ch. 133, deal with large and small holdings o land and impose tax burdens often of magnitude upon then

Public utilities commissions have been created in sever provinces and necessarily exercise judicial powers in determ ining questions concerning property and civil rights withi the province concerned; *In re Toronto Railway Co. and Cit of Toronto,* 44 O.L.R. 381, 15 O.W.N. 244.

Commissioners to make inquiries concerning public matte with large powers as to the taking of evidence and enfor ing the attendance of witnesses, may be appointed unde R.S.M., 1913, ch. 34; *Kelly v. Mathers,* 25 Man. R. 580, W.W.R. 1208, 32 W.L.R. 33.

The contract of fire insurance is subject to statutory con ditions under R.S.M., 1913, ch. 103, one of which provide that the value of the property insured, the value of the pro perty saved or of the amount of the loss, shall, whether th right to recover on the policy is disputed or not, and inde

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endently of all other questions, be submitted to arbitration, nd that the award shall be conclusive as to the amount of ne loss, and the amount to be paid by the company. Juris- iction is thereby conferred on a statutory tribunal to measure nd determine the compensation payable under a statutory ontract of fire insurance. In the case under consideration statutory contract of employment insurance is similarly ealt with.

All of these tribunals are exercising useful powers of a udicial character, which have been conferred upon officials ap- ointed under the authority of the provincial Legislature. Gen- rally speaking they are not powers which can with advantage e administered by a Superior Court, for they combine ad- inistrative with judicial functions. An insurance scheme uch as the one under consideration, could not in my opinion e successfully administered by a Superior Court of the type hich is contemplated by sec. 96 of *The B.N.A. Act.*

But even if the powers conferred upon this Board should e found to include some of the powers of a Superior Court udge, the Act itself or the appointment of the Board would ot for that reason alone be *extra vires* of the Legislature. It ould, in my opinion, take much more to give to the Board ne status and jurisdiction of a Superior Court. Certain lauses of the Act in question may call for judicial interpreta- on as occasion arises.

Sec. 52 [amended by 1919, ch. 118, sec. 22] provides that:

> The board shall have the like powers as the Court of King's Bench in Manitoba or a judge thereof for compelling the attendance of witnesses nd of examining them under oath, and compelling them to answer ques- ons and compelling the production of books, papers, documents and ings.

Such a clause (and there are others in the Act) may be crutinized as to its effect and the jurisdiction which the Leg- slature intended to confer upon officials of the province when ccasion arises, but it does not arise in connection with the resent appeal, and if it did would not, in my opinion, in- alidate the scheme of the Act or the appointment of the Board for the purposes which are clearly within the jurisdic- ion of the Legislature. *Kelly v. Mathers, supra.*

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It has been urged in argument that certain clauses of the Act impose the findings of the Board upon the Court of King's Bench without permitting any inquiry on the part of the Court as to the jurisdiction of the Board to make such findings; that in effect the Board is made a Court superior to the Court of King's Bench, and secs. 13, 57, 58, 60 and 61 are referred to.

To my mind these sections mean that a party whose rights have been declared by the Board, cannot be subjected to process in any Court to vary or alter the adjudication and determination made by the Board in respect to matters which are within the scope and purview of the Act. Why should there be any review by a Court? The rights and remedies provided by the Act were never administered by the Court of King's Bench. They are new creations of the Act itself, and the Legislature, being determined to put an end to litigation in respect to workmen's compensation, has decreed that the Board alone shall be responsible for its findings and must itself and of its own motion correct its errors, if any occur. These sections do not mean that the Court of King's Bench is immediately bound to stay or dismiss an action because the Board certifies that it has determined or adjudicated in respect to an accident in which the same parties are concerned. If the pleadings and proceedings in the Court of King's Bench or the County Court show jurisdiction upon their face the Court will be justified in proceeding with the action until satisfied that the cause of action sued on is one of the causes of action which has been abolished by the Act. When satisfied on the point the Court should stay the action in obedience to the statute and not because it is bound to act blindly upon a certificate of the Board which may be founded in complete error as to the cause of action which is before the Court. When it has been satisfactorily established that the Board has determined and adjudicated under the Act the identical cause of action which is before the Court, such determination and adjudication will be final and conclusive; *Murphy v. Toronto* 41 O.L.R. 156, 14 O.W.N. 11, 45 D.L.R. 228, at p. 246 *C.N.R. v. Wilson,* 29 Man. R. 193, [1918] 3 W.W.R. 730 49 D.L.R. 440; *Jones v. C.P.R.,* [1919] 3 W.W.R. 994, 49 D.L.R. 335.

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The judicial acts which the Board is to perform under 57 of the Act as amended by the statute of 1919, are y such as are necessary to establish the right of the claim- or his dependents to rank against the insurance fund, and measure his compensation according to scale. They in no conflict with the jurisdiction previously possessed by the urts in respect to common-law rights and statutes which e been repealed, and even if they did would, in my opinion, far short of conferring Superior Court jurisdiction upon Board.

This Board which has been held by the judgment appealed n to be a "Superior Court" within the meaning of sec. of *The B.N.A. Act* has a number of characteristics which in my judgment, incompatible with that finding. It is lared to be a body corporate by sec. 46. It has no authority render enforceable judgments, but must seek the aid of Court of King's Bench when necessary to carry its orders effect. Secs. 27, 60; 77 (4). In order to enforce pen- es for violation of its orders it must apply as complainant a justice of the peace asking for a summary conviction er sec. 30, as amended by the Act of 1919. In order to over assessments the Board is given a right of action against defaulting employer in respect of the amount unpaid to- ner with costs of such action by sec. 69E. It thereby be- nes a plaintiff in legal proceedings. There is no Court which it is superior or over whose proceedings it can ex- se any control.

Sec. 96 of *The B.N.A. Act* when it refers to Superior and unty Courts means Courts similar to those which were so gnated in 1867. *In re Small Debts Recovery Act, supra.* ey were Courts for which the statute provided Judges ned in the law and of standing at the bar of the province to ch they were commissioned.

Under the Act in question, which establishes a tribunal from ch solicitors and counsel are banished by sec. 11, it is not uisite that the members of the Board should possess any al qualification whatsoever. The manifest purpose of the gislature was to take away from the Courts, the lawyers,

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and the litigiously inclined, the rights and privileges formerly enjoyed by them in respect to certain classes of action in tort, and to substitute a lay tribunal administering an elaborate scheme of state insurance. The creation of a new type of Superior Court or County Court was never contemplated by the Legislature and I cannot agree that it has unwittingly done so.

Had the opposite conclusion been arrived at, there would still remain the fact, that this Board has been in operation for some years and has transacted a large volume of business, has levied and disbursed large sums of money, and now holds large sums of money for the satisfaction of compensation claims which may arise in the future. The Commissioners if improperly appointed Judges of a Superior Court are nevertheless *de facto* Judges and as such subject to removal only by *quo warranto* proceedings in which they can take part in defence of the jurisdiction which they have exercised. As pointed out by Sir William Meredith, C.J.O., *In re Toronto Ry. Co. and City of Toronto, supra,* the status of a *de facto* Judge is not open to attack in a collateral proceeding where he holds at least a colourable title, and his acts as such are valid until properly questioned. In that case the Appellate Division of the Ontario Supreme Court unanimously came to the conclusion that the Ontario Railway and Municipal Board, although it has for some purposes, judicial functions to perform, is not a Court but an administrative body having as incidental to the performance of its administrative functions and the exercise of its administrative powers, jurisdiction to construe contracts. The Judicial Committee of the Privy Council while allowing an appeal on other grounds, ([1920] 1 W.W.R. 755) did not question the judgment on the point quoted.

With great respect, I am of opinion that the Workmen's Compensation Board of Manitoba is neither a "Superior Court," nor an "inferior Court." It has no controlling authority over any other Court which is a distinguishing characteristic of a Superior Court, nor is it subordinate to any other Court which is a distinguishing characteristic of an inferior Court. 15 *Corpus Juris* 721. It has none of the characteristics

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the Superior Courts of common law which were the ueen's Bench, the Common Pleas, and the Exchequer, at estminster, *Gerrard v. Tuck*, 8 C.B. 231, 18 L.J.C.P. 338. either has it, in my opinion, the characteristics of the Su- rior Courts as they existed in Canada in 1867, when sec. of *The B.N.A. Act* came into force.

It is an administrative tribunal with certain ancillary judicial nctions for the adjustment of civil rights within the province, respect to workmen's compensation for injuries, within ed limits. No portion of the jurisdiction previously exer- ed by the Courts in respect to employers' liability has been signed to it, and the field in which it operates is a new eation within the competence of the Legislature, which has thority to appoint and pay the Commissioners who consti- e the Board.

It was admitted by counsel on the argument before this urt that the facts relied on in this case as establishing the use of action were the same as those before the Board in spect to which a certificate was given and that the Board d adjudicated upon the matter. In view of this admission hink, with great respect, that the appeal should be allowed d the dismissal of the action affirmed.

Judgment: It having been agreed by counsel on the argu- ent before this Court that the facts in this case relied on as ablishing the plaintiff's cause of action were identical with ose upon which the Board had adjudicated and in respect which the Board had given its certificate, the judgment of e Court is that the order or judgment appealed from be set de and the action dismissed.

The defendants are entitled to the costs of this appeal and sts in the Court below.

Appeal allowed with costs.

M.LR.

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COURT OF APPEAL

IN RE FENTON ESTATE

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN JJ.A.

Wills—Mortmain—Statute of Mortmain not in Force in Manitoba.

The *Statute of Mortmain*, 9 Geo. II., ch. 36 (Imp.) is not in force i Manitoba. It was not introduced as part of the law of England b virtue of 38 Vict., ch. 12, sec. 1 (now sec. 11 of *The King's Bench A* R.S.M., 1913, ch. 46) as it is not an Act which "can be made applicabl to the province.

Expressions in certain acts of incorporation by the Legislature of th province such as "without being subject to any law of mortmain," "No withstanding the statutes of Mortmain," etc., were used *ex abundan cautela* and with no intention or effect of declaring that the *Statute Mortmain* was in force.

Judgment of Galt, J. reversed; *Law v. Acton*, 14 Man. R. 246, overruled

ARGUED: 21st April, 1920.
DECIDED: 11th May, 1920.

Statement. APPEAL by the Attorney-General of Manitoba from judg ment of Galt, J., holding that the *Statute of Mortmain* is i force in Manitoba. Appeal allowed.

GALT, J.—This is a motion on behalf of the Canada Tru Company, administrators with the will annexed of the estat of the late Frances Emily Fenton for the interpretation of clause in the will.

The deceased lady was a spinster resident at Solsgirt Manitoba, but for some time prior to the year 1911, she we to Las Vegas, in New Mexico, U.S.A., to be treated for tube culosis.

By her will, dated October 5, 1910, she appointed Franc T. B. Fest, of San Miguel, her sole executor. She died o March 21, 1911, and Dr. Fest obtained probate of the will o November 9, 1911, in the northern judicial district. The e ecutor proceeded to administer the estate, but before com pleting it, he died on March 12, 1917. On December 20, 191 administration with the will annexed was granted to the Ca ada Trust Company.

It appears that all the debts of the testatrix have been pa and that the only property unadministered consists of certa

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ds in Manitoba, being the north-east quarter and the south f of sec. 2, tp. 17, rge. 26, west of the principal meridian.

The clause of the will which gives rise to this motion is the lowing:

ll the rest, residue and remainder of my property and estate, both real personal, of whatsoever kind and wheresoever situate, of which I may seized or possessed, or in which I may have any interest whatever, I eby give, bequeath and devise unto my executor and administrator, Francis T. B. Fest, the same to be applied by said executor and ad- istrator for the purpose of research of work in the alleviation of rculosis, and to be expended according to the best judgment of said inistrator hereinafter appointed.

Upon the motion before me Mr. Hunt appeared for the nada Trust Company, Mr. Auld for Mrs. Fest, the admin- atrix of the late Dr. Fest; Mr. Bergman for several next kin who would be entitled to share in any property of the atrix undisposed of by the will, and Mr. John Allen for Attorney-General.

The principal question argued was as to whether or not the tute, 9 Geo. II, ch. 36, sometimes called *The Mortmain Act* sometimes *The Charitable Uses Act,* is or is not in force Manitoba. If it be in force, the gift to Dr. Fest for re- rch work in aid of treatment for tuberculosis would fail being a charitable use within the meaning of the Act. In h case the beneficiaries represented by Mr. Bergman would entitled to the property. If, on the other hand, the statute not in force, the Attorney-General claims the right to take r the property and apply the proceeds of it towards the e of tuberculosis in Manitoba at the Ninette Sanitarium otherwise.

In support of his argument, Mr. Allen handed in a carefully pared memorandum of the history of this mortmain legis- on down to date, and he presented a strong argument inst the view that the *Statute of Mortmain* is in force in nitoba.

The Mortmain Act of 9 Geo. II, ch. 36, substantially pro- es as follows: No disposition or gift of lands for charit- e uses whatsoever shall be made unless such gift be made deed in the presence of two or more credible witnesses

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twelve calendar months at least before the death of such donor, and be enrolled in His Majesty's High Court of Chancery within six calendar months next after execution thereof, and unless the same be made to take effect in possession for the charitable use intended to take effect in the making thereof and be without any power of revocation. An exception is made in favour of dispositions for the benefit of the two universities and of the colleges of Eton, Winchester or Westminster, and all property in Scotland is excepted.

In Ontario the received opinion is that the statute is in force there. In reaching this conclusion the Courts have been strongly influenced by the fact that in several Acts of the Legislature references to *The Mortmain Act* were made on the assumption that it was there in force. See *Doe d. Anderson v. Todd,* 2 U.C.Q.B. 82.

Mr. Allen, in the memorandum which he has handed in, sets out, with his usual frankness, several references of the same kind in the statutes of Manitoba. For instance: In ch. 50 of the Manitoba statutes for 1895, incorporating The Masonic Temple Association of Winnipeg, the following clause appears:

> 2. The said Corporation shall have perpetual succession and a common seal, with power to make, alter or break the said seal by by-law to that effect, and shall have power from time to time and at all times, hereafter be able and capable to purchase, acquire, hold, possess, exchange and to have, take, receive by gift, or devise (without being subject to any law of Mortmain) &c.

One would suppose that where the introduction of a new law depended upon statute some provision would be enacted directly and definitely introducing the law. It often happens that provisions are inserted in statutes *ex abundanti cautela* or *per incuriam.* Misapprehension of the law by the Legislature does not make bad law good: *Mollwo v. Court of Wards,* L.R. 4 P.C. 419, at p. 437; *Pooley v. Driver,* 5 Ch. D. 458, at p. 484, 46 L.J. Ch. 466; *In re Lockwood,* 12 Man. R. 655, per Killam, C.J., at p. 662, and per Richards, J. at p. 668. However, the Courts of Ontario have looked at the matter from a different point of view and have accepted the casual references in statutes to *The Statute of Mortmain* as indicating the view that the province had introduced that law.

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The position of the question is the same here in Manitoba as it was in Ontario. There is no direct statutory provision introducing the law, but we have a decision of the late Mr. Justice Richards in *Law v. Acton,* 14 Man. R. 246, following the reasoning of the Ontario Judges. All that Mr. Justice Richards said in his judgment was this (at p. 248):

The Mortmain Act, 9 Geo. 2nd, c. 36, has been repeatedly held to be in force, in Ontario, except as limited by Provincial statutes; and such holding has been approved by the Supreme Court of Canada in *Macdonnell v. Purcell,* 23 S.C.R. 101. There is, I think, no doubt that, except as it may be affected by Provincial statutes, the above Act of 9 Geo. 2nd is in force in Manitoba.

It is inaccurate however, to say that the decisions in Ontario have been approved by the Supreme Court of Canada in *Macdonnell v. Purcell,* referred to. That case was heard before five members of the Supreme Court and only two of them appeared to have expressed opinions in favour of those decisions.

Mr. Allen argues that the question was not carefully examined by Mr. Justice Richards, and he points out that the decision in *Law v. Acton, supra,* has been adversely commented upon by one or more Judges in other provinces. Be that as it may, the practice in Manitoba is that when a question has been decided by one of the Judges, the decision is accepted and followed by any other single Judge unless under very exceptional circumstances.

A very similar point of law arose in *Bourne v. Keane,* recently decided by the House of Lords, in [1919] A.C. 815, 89 L.J. Ch. 17. The question in that case was as to whether a bequest of personal estate for masses for the dead is or is not void as a gift to superstitious uses. Decisions had been rendered from 1835 down to date holding that such bequests were void. The House of Lords overruled these decisions. Lord Chancellor Birkenhead says, at p. 860:

In my view it is undoubtedly true that ancient decisions are not to be lightly disturbed when men have accepted them and regulated their dispositions in reliance upon them. And this doctrine is especially deserving of respect in cases where title has passed from man to man in reliance upon a sustained trend of judicial opinion.

But this, my Lords, is not the present case. If my view is well founded citizens of this country have for generations mistakenly held themselves

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precluded from making these dispositions. I cannot conceive that it is my function as a judge of the Supreme Appellate Court of this country to make error perpetual in a matter of this kind. The proposition crudely stated really amounts to this, that because members of the Roman Catholic faith have wrongly supposed for a long period of time that a certain disposition of their property was unlawful, and have abstained from making it, we, who are empowered and bound to declare the law, refuse to other members of that Church the reassurance and the relief to which our view of the law entitles them. My Lords, I cannot and will not be a party to such a proposal.

So fas as I can see it is quite open to the Supreme Court or the Privy Council at any time to overrule the views expressed by the Ontario Judges, and, it is open to our Court of Appeal to overrule the decision of Mr. Justice Richards.

But for the reason which I have already given, I follow the decision in *Law v. Acton, supra,* leaving the parties to obtain the views of the Court of Appeal if they so desire.

I therefore hold that the residuary bequest to Dr. Fest was void under the *Statute of Mortmain* and that the beneficiaries are entitled to the property.

I think it is a case in which the costs of all parties should come out of the estate.

The Attorney-General of Manitoba appealed.

John Allen, for the Attorney-General of Manitoba.
J. Auld, for trustee.
H. A. Bergman, for next of kin.

PERDUE, C.J.M.—The point involved in this case is simply whether the so-called *Mortmain Act,* 9 Geo. II., ch. 36, is or is not in force in Manitoba. This Act has long been held to be in force in the province of Ontario: *Doe d. Anderson v. Todd,* 2 U.C.Q.B. 82; *Whitby Corporation v. Liscombe,* 23 Gr. 1; *Macdonell v. Purcell,* 23 S.C.R. 101. In the first-mentioned case Robinson, C.J., in giving judgment, clearly indicated that he would have followed the reasoning of Sir W. Grant in *Atty.-Gen. v. Stewart,* 2 Mer. 143 (16 R.R. 162), and have held that the statute had not been introduced into Upper Canada by the Act of the Legislature of that province, 32 Geo. III., ch. 1, had it not been that the Legislature had

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PERDUE, C.J.M.

assumed in certain Acts that 9 Geo. II., ch. 36, was in force in the province. This case was decided in 1845. In 1875, the same point came up for consideration for the first time in a Court of Appeal in the case of *Whitby Corporation v. Liscombe, supra.* In the meantime several decisions had been rendered in the superior Courts following *Doe d. Anderson v. Todd, supra.*

In *Whitby Corporation v. Liscombe* it was held that 9 Geo. II., ch. 36, was in force in Ontario. The grounds upon which it was so held were: (1) That the decision in *Doe d. Anderson v. Todd, supra,* has been acquiesced in too long, and had for too long a period governed titles to land in Ontario, to be interfered with by any authority short of legislative enactment; (2) That there had been ample recognition through Acts of the Legislature that the statute in question had been introduced into and was in force in the province. Expressions occur in some of the judgments which indicate that had the question come before the Court as *res integra* the decision would not, at all events, have been unanimous. I would refer to the remarks of Patterson, J. at pp. 27-28 and of Moss, J. at p. 36 (23 Gr.). The latter said:

> If the only question was, whether *Doe d. Anderson v. Todd* was well decided, I should hesitate long before holding in the affirmative. * * * Robinson, C.J. was of opinion that but for subsequent legislative exposition the true interpretation of the Stat. of Geo. III, excluded *The Mortmain Act,* while the other members of the Court seem to have entertained a different view. The reasoning of the Chief Justice appears to me to be unanswerable—at least if the decision of Sir William Grant in *Atty.-Gen. v. Stewart* [*supra*] is correct, and apart from its intrinsic force it would be hopeless to impugn this after its approval by the House of Lords in *Whicker v. Hume,* 7 H.L. Cas. 124, at p. 150, 28 L.J. Ch. 396.

In *Macdonell v. Purcell, supra,* two of the Judges refer to *Doe d. Anderson v. Todd* and *Whitby Corporation v. Liscombe* as declaring the state of the law in Ontario in regard to the statute 9 Geo. II., ch. 36, being in force in that province. It was not a decision of the Supreme Court upon that point.

In *Law v. Acton,* 14 Man. R. 246, Mr. Justice Richards, following the above Ontario cases, held that 9 Geo. II., ch. 36, was in force in Manitoba, except as it may be affected by provincial statutes.

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PERDUE, C.J.M.

According to the decision of *Sinclair v. Mulligan,* 3 Man. R. 481, 5 Man. R. 17, the laws in force in Manitoba at the time that the province entered confederation were the laws of England of the date of the Hudson's Bay Company's charter, namely, May 2, 1670. In 1874, the Legislature of the province declared that the Court of Queen's Bench, then formed,

> shall decide and determine all matters of controversy relative to property and civil rights, both legal and equitable, according to the laws existing, or established and being in England, as such were, existed and stood on the fifteenth day of July, in the year 1870, *so far as the same can be made applicable* to matters relating to property and civil rights in this Province [38 Vict. ch. 12, sec. 1].

This section has been repeated in the several consolidations and revisions of the statutes down to the present time.

It is plain that all the laws of England were not introduced but only those that "can be made applicable" to the subjects mentioned in the enactment. In *Jex v. McKinney,* 14 App. Cas. 77, 58 L.J.P.C. 67, a decision of the Privy Council holding that 9 Geo. II., ch. 36, had not been introduced into British Honduras, the expressions used in the Act of the assembly of the colony, introducing the law of England, were,

> so much of the common law of England as has been used in or is applicable to this Settlement, and to the inhabitants thereof;

also introducing the statutes there described

> in so far as the same are applicable or can be applied to this Settlement and to the inhabitants thereof.

Lord Hobhouse in delivering the judgment of the Judicial Committee pointed out that the condition of applicability to the colony runs through the whole of the enactments introducing the laws of England. He then went on to say:

> It has been argued at the bar that the laws described are to prevail if they are applicable or can be applied, and that the latter words, give a wider sense to the word "applicable." Their Lordships read the words "can be" as meaning "can reasonably be" agreeing herein with Lord Justice Knight Bruce, who in *Whicker v. Hume,* 14 Beav. 509, 1 DeG. M. & G. 506, 21 L.J. Ch. 406, placed that construction upon similar words in a New South Wales Act. The change of expression would rather seem to point to such cases as are provided for by the Ordinance of 1879, where some amount of moulding in formal or insignificant details is required before an English statute, suitable in its nature to the needs of the Colony, can be actually applied to them.

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PERDUE, C.J.M.

Lord Hobhouse then considers the question whether the atute of George II. is suitable to a young English colony in new country—the very condition of Manitoba in 1874. He fers to the principle on which such questions should turn as d down by *Blackstone* in the *Commentaries,* vol. 1, p. 108. e points out that in the two decisions above referred to, *ty.-Gen. v. Stewart* and *Whicker v. Hume,* all of the emin- t Judges who took part in one or other of these cases de- led that the statute was framed for reasons affecting the nd and society of England, and not for reasons applying to new colony.

The statute has been held not to apply to British Columbia, *re Pearse Estate,* 10 B.C.R. 280; or to Saskatchewan, *In Miller Estate,* 11 Sask. L.R. 76, [1918] 1 W.W.R. 929; or ew Brunswick, *Ray v. Annual Conference of New Brunsck,* 6 S.C.R. 308.

In the period between the entry of Manitoba into confeder- on and the year 1884, a number of Acts of the Legislature ere passed incorporating religious, educational and charit- le bodies and enabling some of them to hold land for char- ble and other purposes, and others to hold land bequeathed them. There has been no legislation of the province which s directly introduced the statute 9 Geo. II. Down to 1884, ere were many Acts passed which were inconsistent with the istence of that statute as part of the law of the province. is stated that the first mention of a statute or statutes of ortmain in a Manitoba statute is found in *The Methodist urch Act, 1884,* ch. 65. After that year there occur ex- essions in certain Acts of incorporation such as : "without ense in Mortmain," 1886, ch. 56, sec. 3; "without being sub- ct to any law of Mortmain," 1895, ch. 50, sec. 2, and similar ords. The above expressions were, I think, in each case in- oduced by the draftsman into the Act *ex abundanti cautela,* perhaps the expression was copied from an Ontario statute. he Legislature when passing these Acts, with the exceptions framed, had no intention of declaring that the Statutes of ortmain were in force in this province. To put such a con- ruction upon these Acts would be to introduce "by a side ind" legislation which was not in the contemplation of the

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PERDUE, C.J.M.

Legislature to enact. See *Forbes v. Ecclesiastical Commissioners,* L.R. 15 Eq. 51, at p. 53, 42 L.J. Ch. 97; also, *Western Counties Ry. v. Windsor and Annapolis Ry.,* 7 App. Cas. 178, at p. 189, 51 L.J.P.C. 43.

Applying to the Act of 1874, 38 Vict. ch. 12, the proper rule of construction as laid down in *Jex v. McKinney, supra,* it did not introduce the statute 9 Geo. II., ch. 36, into Manitoba. The proper construction was placed on the statute, for a number of years and no exception was made, in Acts creating charitable corporations, of enactments respecting mortmain, because no protection against mortmain was necessary. It would be strange indeed if the taking of needless precautions against the operation of a law which was not in force should have the effect of bringing that very law into force. This would be most unfair to corporations created prior to 1884 whose incorporators, taking a proper view of the law, asked for no protection against the operation of Statutes of Mortmain.

Mr. Justice Galt followed (*ante,* p. 246) *Law v. Acton, supra,* as being a decision of a Judge of co-ordinate jurisdiction, not, as I read his judgment, because he approved of the *ratio decidendi* in that case.

I think the appeal should be allowed and the matter referred back to the Court of King's Bench to settle a scheme for the execution of the trust. See *Lilley v. Atty-Gen., In re Pyne* [1903] 1 Ch. 83, 72 L.J. Ch. 72. The costs of all parties should come out of the estate.

CAMERON, J.A.—The so-called *Statute of Mortmain,* ch. 36, 9 Geo. II., entitled *An Act to restrain the disposition of lands, whereby the same become unalienable* was the first Act passed in England by which gifts of land to charitable purposes made by will were avoided. By it, however, gifts to such purposes were permitted if carried out in a certain way, that is, by a gift or conveyance by deed executed in the presence of two or more witnesses 12 months before the date of the death of the donor and enrolled in the Court of Chancery within six months after its execution. The objects influencing Parliament in passing the Act are set forth in the preamble to the Act, but were not necessarily fully disclosed.

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CAMERON, J.A.

The question before us is whether this Act is in force in this rovince by virtue of sec. 1, ch. 12, 38 Vict., now sec. 11 of ur *King's Bench Act*, R.S.M., 1913, ch. 46, under which the ourts in Manitoba are to decide all matters of controversy elative to property and civil rights according to the laws of ngland as they were on July 15, 1870, "so far as the same an be made applicable to matters relating to property and vil rights in this Province."

The statute, 9 Geo. II, ch. 36, did not extend to the British Colonies; its causes, its objects, its provisions, its qualifications, and its exceptons, it is a law wholly English, calculated for the purposes of local olicy, complicated with local establishments, and incapable without great congruity in the effect, of being transferred as it stands, into the Code any other country.

Jarman on Wills, pp. 271-2, citing Sir William Grant in *tty.-Gen. v. Stewart*, 2 Mer. 143 (16 R.R. 162); *Atty.-Gen. Giles*, 5 L.J. Ch. 44; *Whicker v. Hume*, 7 H.L. Cas. 124, 28 .J. Ch. 396; *Mayor of Lyons v. East India Co.*, 1 Moo. P.C. 75; *Jex v. McKinney*, 14 App. Cas. 77, 58 L.J.P.C. 67. *here is nothing in the Act* of 1736 (or 1888) to prevent a erson domiciled in Victoria from leaving money for the purhase of land in England for a charitable object. *Mayor of anterbury v. Wyburn*, [1895] A.C. 89, 64 L.J.P.C. 36, where ord Hobhouse approves and applies Sir W. Grant's reasons *Atty.-Gen. v. Stewart, supra*, holding that

It cannot have been intended that methods of a local character prebed for making a lawful gift should be adopted in a distant colony, , if not, that the gift should be invalid.

In *Mayor of Lyons v. East India Co., supra*, Lord rougham referring to the distinction between foreign settleents acquired by conquest and those made by colonizing, says hat in case of the former the law of the country subsists until hanged, and in the latter the subjects of the Crown carry with hem the laws of England, subject to the limitation expressed Mr. Justice Blackstone

hat only so much of the English law is carried into them by the settlers is applicable to their situation and to the condition of an infant colony. nd Sir William Grant in *Atty.-Gen. v. Stewart* applies the same exceptn even in the case of conquered or ceded countries, into which the nglish law of property has been generally introduced. Upon this round, he held that *The Statute of Mortmain* did not extend to the Col-

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CAMERON, J.A.

onies governed by the English law, unless it has been expressly introduce there, because it had its origin in a policy peculiarly adapted to the ci cumstances of the mother country [p. 273].

In *Jex v. McKinney, supra,* Lord Hobhouse says that th principle laid down in *Blackstone* has been applied in tw cases and that every Judge who has addressed his mind to th question has come to the same conclusion, namely:

> that the statute was framed for reasons affecting the land and society England and not for reasons applying to a new colony.

In addition to these cases I refer to *Doe d. Hazen v. Recto etc. of St. James,* 18 N.B.R. 479; *In re Pearse Estate,* 1 B.C.R. 280, and *In re Brabant,* 10 B.C.R. 282; *Clement's Ca adian Constitution,* pp. 274, *et seq.*

Where the law of England has been introduced in coloni by legislation, there is a difference in the wording of the var ous enactments but there is little or no difference in substanc There can be no real difference in meaning between the enac ment under discussion in *Jex v. McKinney, supra,* and th words in our *King's Bench Act.* The evident intention of th legislating bodies was the same in both cases.

The difficulties in the case are occasioned by the decisio of the Courts of Upper Canada and Ontario commencing wi the well-known decision in *Doe d. Anderson v. Todd,* U.C.Q.B. 82, the effect of which was that the Statute, 9 Ge II., ch. 36, was in force in Upper Canada by virtue of its in plied recognition by the Legislature; the view of the majori of the Court being that it was not introduced by the sole for of 32 Geo. III., ch. 1. See *Clement's Canadian Constitutio* pp. 287 *et seq.* That doubts were entertained as to the correc ness of this decision appears from the judgments in *Whit Corporation v. Liscombe,* 23 Gr. 1, where it was follow mainly on the ground that it had established a rule of law, r cognized for so long a period, that it was inadvisable in th public interest to interfere with it. But we are not bound b the Ontario decisions which are at variance with those cite some of which are of the highest authority and binding upo us.

The judgment of Mr. Justice Richards in *Law v. Acton,* Man. R. 246, was dwelt on as a binding authority or as ha

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CAMERON, J.A.

g, at any rate, created an established rule of law from which e must not now depart. That case was decided in 1902, but ere is no reference whatever in the judgment or in the argument to *Jex v. McKinney, supra,* decided in 1889, or to *Atty.-en. v. Stewart, supra,* or *Whicker v. Hume, supra.* In *Macnell v. Purcell,* 23 S.C.R. 101, referred to by Mr. Justice ichards, two of the Supreme Court Judges considered that opinion given by counsel, which was a factor in the litigaon, on the subject of the law of mortmain in Ontario, was und under the law of that province as it then stood. But e subject itself was not in issue in the case before the Sueme Court. In my opinion, in view of the overwhelming eight of reason and authority, we cannot avoid overruling e decision in *Law v. Acton, supra.* As pointed out by Mr. ustice Galt, (*ante,* p. 34), the present Lord Chancellor in the cent case of *Bourne v. Keane* [1919] A.C. 815, 89 L.J. Ch. , declared that it is not the function of the Courts to make ror perpetual.

I confess I can attach no particular significance to the prosions found in various private Acts of the Legislative Assembly of this province, purporting to modify the application the *Statute of Mortmain* in the case of corporations incorrated by it of a charitable, educational, or ecclesiastical aracter. In the first instances such clauses were no doubt serted *ex abundanti cautela,* for as remarked by Lord Cranorth in *Whicker v. Hume, supra* (p. 161 [7 H.L. Cas.]):

> Nothing is more difficult than to know which of our laws is to be rearded as imported into our colonies,

nd the earlier enactments were subsequently followed largely a matter of course by successive draftsmen. It is, to my ind, impossible to agree that they have the effect of introducg the statute, for, as pointed out by Sir William Grant in *tty.-Gen. v. Stewart, supra,* and by Lord Chelmsford in *Whicker v. Hume, supra,* at p. 151, (7 H.L. Cas.) that could nly be done by clear and positive enactment. Nor can I acede to the contention that the re-enactment of sec. 11 in *The ing's Bench Act* in the revision of 1913 had the effect of ystallizing into law an erroneous decision of a single Judge.

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Judgment.

HAGGART, J.A.

HAGGART, J.A.—I have carefully perused the reasons of my brothers Cameron and Fullerton and I have come to the same conclusion, namely, that the imperial Statute, 9 Geo. II., ch. 36, is not in force in Manitoba.

On the argument a great deal of stress was laid upon the fact that several private Acts of the Legislature in the incorporation of churches and other educational and charitable organizations, provision was made for accepting devises or bequests. This, it was contended, had the effect of introducing the *Statute of Mortmain.*

I agree with the disposition my brother Judges have made of that question.

My brother Judges have very fully covered the ground and to repeat the reasons given by them would serve no good purpose.

I would here refer to the decisions in *Doe d. Anderson v. Todd,* 2 U.C.Q.B. 82; *Whitby Corporation v. Liscombe,* 23 Gr. 1; *Law v. Acton,* 14 Man. R. 246; *Atty.-Gen. v. Stewart,* 2 Mer. 143 (16 R.R. 162); *Whicker v. Hume,* 7 H.L. Cas. 124, 28 L.J. Ch. 396, and the other cases that have been specifically referred to by Judges Cameron and Fullerton.

What is generally known as the *Statute of Mortmain,* ch. 36, 9 Geo. II., is not in force in the province of Manitoba.

FULLERTON, J.A.—The important question raised in this appeal is whether or not the imperial Statute, 9 Geo. II., ch. 36, commonly called *The Mortmain Act,* is in force in Manitoba.

No specific legislation has ever been enacted introducing *The Mortmain Act* into Manitoba.

Sec. 1 of 38 Vict., ch. 12, (Man.) provides that

> The Court of Queen's Bench in Manitoba shall decide and determine all matters of controversy relative to property and civil rights according to the laws existing, or established and being in England, as such were, existed and stood, on the 15th day of July, in the year 1870, *so far as the same can be made applicable to matters relating to property and civil rights in the Province* * *

In *Atty.-Gen. v. Stewart* (1817) 2 Mer. 143 (16 R.R. 162) the question was whether *The Mortmain Act* was in force in

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FULLERTON, J.A.

e Island of Grenada. By the Treaty of Paris made in 1763 enada was ceded to Great Britain.

The King's proclamation, dated October 9, 1763, establishes eparate Legislature and provides that

> the meantime, and until such assemblies could be called, all persons in- biting it, or resorting to, the said colonies, were to confide in the royal tection for the enjoyment of the benefit of the laws of England, for ich purpose power was given under the great seal, to the Governor of said colonies, with the advice of the Council, to erect Courts of Judi- ure within the colonies for hearing and determining all causes, as well minal as civil, according to law and equity, and as near as might be eeable to the law of England, with liberty of appeal to the King in uncil.

Legislative assemblies were from time to time convened and veral Acts passed but no Act was passed in any way relat- to *The Mortmain Act*.

Sir Wm. Grant, M.R. held that *The Mortmain Act* was not force. After pointing out that the mischief to be prevented the statute was a mischief existing in England, that the ses which necessitated such an Act never existed in the onies, that if a Legislature of a colony were disposed to opt a similar law it would not adopt this Act as it stands th the two English universities and the three great English ools or colleges exempted from its operation, that the pro- ions of the statute, requiring alienations authorized by the t to be enrolled in His Majesty's High Court of Chancery, uld not be complied with, Sir Wm. Grant goes on to say at 163 (16 R.R.):

> f the Legislature of the island think any measure of the same kind essary, they may so shape and modify it, as to adopt it to their own cumstances and situation. But, framed as *The Mortmain Act* is, I nk it quite inapplicable to Grenada, *or to any other colony*. In its ses, its objects, its provisions, its qualifications, and its exceptions, it is aw wholly English, calculated for purposes of local policy, complicated h local establishments, and incapable, without great incongruity in the ct, of being transferred as it stands into the code of any other country.

In 1851, the same question was raised in regard to the laws New South Wales in the case of *Whicker v. Hume*, 14 av. 509, 1 De G.M. & G. 506, 21 L.J. Ch. 406.

By sec. 24 of 9 Geo. IV., ch. 83 (Imp.) it is enacted

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That all Laws and Statutes in force within the Realm of *England* at the time of the passing of this Act (not being inconsistent herewith, or with any Charter or Letters Patent or Order in Council which may be issued in pursuance hereof) shall be applied in the Administration of Justice in the Courts of *New South Wales* * * so far as the same can be applied within the said Colonies * *

It will be noted that the words of *The Manitoba Act* above quoted are

* * so far as the same can be made applicable to matters relating to property and civil rights in the Province * *

The matter first came before Sir John Romilly, M.R., who held that the question was settled by the decision in *Atty.-Gen. v. Stewart, supra,* and that *The Mortmain Act* was not in force in New South Wales.

An appeal was heard by Lord Justices Sir James L. Knight Bruce and Lord Cranworth and dismissed. In his judgment in 1 De G.M. & G. at p. 510, Sir James L. Knight Bruce, L.J. said, referring to the imperial Statute above quoted:

Taking the whole of the section together, I am of opinion, that the words "can be applied" mean "can be reasonably applied," a construction which, of necessity, introduces all those considerations which presented themselves to Sir William Grant's mind in the case of *Atty.-Gen. v. Stewart, supra,* a case specifically differing from the present, but which it is impossible to read without seeing that the opinion expressed by Sir William Grant applies to a case like this.

An appeal was then taken to the House of Lords where the decree was upheld. See 7 H.L. Cas. 124, 28 L.J. Ch. 396.

It is quite clear, from the speeches of the learned Law Lords in this case that they regarded the case of *Atty.-Gen. v. Stewart, supra,* as conclusive on the point.

In 1889, in the case of *Jex v. McKinney,* 14 App. Cas. 77, 58 L.J.P.C. 67, the Privy Council held that on the true construction of the local Acts and ordinances of British Honduras *The Mortmain Act* had not been introduced into British Honduras and approved the decisions in *Atty.-Gen. v. Stewart, supra,* and *Whicker v. Hume, supra.*

The local statute mainly relied on in this case was passed on March 8, 1856. Sec. 5 provided:

That so much of the common law of England as has been used in or is applicable to this Settlement, and the inhabitants thereof * * and all

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atutes of the Imperial Parliament in abrogation or derogation, or in any ay declaratory, of the common law, shall be and continue, and are here- declared to be, part of the laws of this Settlement.

Sec. 7 enacts:

That all laws of universal application relating to * * descents, inheri- nces, and successions, to wills and administrations * * or generally relation to property * * in so far as they are applicable to this Settle- ent and the inhabitants thereof * * shall be and the same are hereby clared, to be the laws of this Settlement; but this is not extended to any w of any local or limited operation, or any law relating to bankruptcy insolvency, or to any Act relating to customs or excise, or to any law lating to or regulating any trade, business or profession.

Lord Hobhouse, who delivered the judgment of the House, fter pointing out that *The Mortmain Act* falls within several the expresions used in these enactments, that it is in deroga- on of the common law and that it relates to successions and wills, and to property, continues:

It has been argued at the bar that the laws described are to prevail if ey are applicable or can be applied, and that the latter words give a der sense to the word "applicable." Their Lordships read the words an be" as meaning "can reasonably be," agreeing herein with Lord stice Knight Bruce, who in *Whicker v. Hume, supra,* placed that con- ruction upon similar words in the New South Wales Act. * * *

If the Colonial enactments are to be construed in this way, we are ought back to the question whether the statute of George II is suitable a young English Colony in a new country. The principle on which ch questions should turn has been laid down by *Blackstone* in his *Com- entaries,* vol. 1, p. 108. It has been applied to the statute of Geo. II in o English decisions, and every Judge who has addressed his mind to e question has come to the same conclusion. In *Atty.-Gen. v. Stewart, pra,* with reference to Grenada, Sir William Grant; in *Whicker v. ume, supra,* with reference to New South Wales, Lord Romilly at the olls, Lord Justices Knight Bruce and Cranworth in the Court of Appeal; ord Chelmsford, Lord Cranworth and Lord Wensleydale in the House Lords; all decided that the statute was passed for reasons affecting the nd and society of England, and not for reasons applying to a new colony. heir Lordships think the reasoning on which those decisions are founded sound reasoning, and is applicable to British Honduras as the Court low has applied it.

Counsel maintaining the position that *The Mortmain Act* is force here rely on the Ontario decisions which hold that the ct is in force in Ontario.

The earliest decision on the point in Ontario is *Doe d. nderson v. Todd* (1845) 2 U.C.Q.B. 82. The Court there eld that *The Mortmain Act* was in force in Ontario.

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In 1876, the Court of Appeal in Ontario in *Whitby Corporation v. Liscombe,* 23 Gr. 1, followed *Doe d. Anderson v. Todd, supra.*

Robinson, C.J., one of the Judges who decided *Doe d. Anderson v. Todd, supra,* was of the opinion that the Ontario Statute 32 Geo. III., ch. 1, standing alone, had not the effect of introducing *The Mortmain Act* but that the Legislature of Ontario by its recognition of *The Mortmain Act* in subsequent legislation had clearly evidenced their intention of introducing it by 32 Geo. III., ch. 1.

At p. 89, (2 U.C.Q.B.) Robinson, C.J. says:

> If the Legislature had left the subject of "Mortmain" untouched, making no reference to it in any of their acts, then I think for the reasons given by Sir William Grant in *Atty.-Gen. v. Stewart, supra,* we would have held that the statutes of Mortmain were not introduced by the provincial statute 32 Geo. III, c. 1, but to treat them as inapplicable to this province, and on that ground to keep them wholly out of view, after what the Legislature has done in contemplation of their being in force, would lead to greater inconvenience and inconsistencies than those which Sir William Grant has pointed out as arguments against their being held generally applicable to the colonies.

As an illustration of legislative recognition, he refers to *The Church Temporalities Act,* 3 and 4 Vict., ch. 78, which he says, provides

> that lands may be conveyed to such uses, for the benefit of the United Church of England and Ireland in this Province, as would clearly have been prohibited by the British stat. 9 Geo. II, and they have shown it to be their understanding, that without such express legislative authority the English statutes of Mortmain would have restrained parties from making such a disposition, for they have added the words "the acts of Parliament commonly called the statutes of Mortmain, or other acts, laws, or usages to the contrary thereof notwithstanding."

In the Court of Appeal, in *Whitby Corporation v. Liscombe, supra,* the judgments are based very largely on the view that as the decision in *Doe d. Anderson v. Todd, supra,* had stood so long and so many titles were dependent on it, it should not be interfered with by any authority short of legislative enactment.

Referring to *Doe d. Anderson v. Todd, supra,* I must confess I have difficulty in understanding how recognition by leg-

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ation, short of actual enactment, can have the effect of nging into force legislation so recognized.

Whether or not *The Ontario Act* introduced *The Mortmain t* must surely depend upon the terms of that statute and the nditions existing in Ontario when it was passed. When the tute was passed *The Mortmain Act* was or was not brought o force. I cannot believe that a casual reference in sub- uent legislation or even a reference which recognizes *The rtmain Act*, as being in force, can have the effect of bring- it into force.

In *North-West Electric Co. v. Walsh*, 29 S.C.R. 33, Sedge- k, J., at p. 48, said:

ut in addition to this it may be observed that any enactments of the slature as to what the law is, is not of itself equivalent to the making he law.

He then quotes from the judgment of the Privy Council in *llwo v. The Court of Wards*, L.R. 4 P.C. 419, at p. 437:

he enactment is no doubt entitled to great weight as evidence of the but it is by no means conclusive; and when the existing law is shown e different from that which the legislature supposed it to be, the im- ation arising from the statute cannot operate as a negation of its ex- nce.

misapprehension of the law by the legislature would not have the ct of making that the law which the legislature had erroneously as- ed it to be. [*Earl of Shrewsbury v. Scott*, 6 C.B. (N.S.) 1, 29 L.J.C. 4.]

n view of the decisions in England which I have already erred to in reference to the introduction of *The Mortmain* into Grenada, New South Wales and British Honduras, s impossible to hold that *The Mortmain Act* was introduced o Manitoba by 38 Vict., ch. 12, sec. 1.

f *The Mortmain Act* is in force here it can only be by rea- of its recognition in subsequent Acts of the Legislature, ich, in my view, as indicated above, is not sufficient.

Numerous statutes have been passed by the Legislature in s province authorizing corporations to hold lands, but the t reference to *The Mortmain Act* is to be found in ch. 65 the Statutes of Manitoba, 1884, entitled *An Act respecting Union of certain Methodist Churches therein named.* Sec. rovides:

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The power conferred upon the said corporation by the Parliament of Canada to take, hold and receive any real or personal estate by virtue of any devise contained in any last will and testament of any person whatsoever, shall not be limited by any statute or statutes of Mortmain or by the provisions of any statutes in this Province.

The next reference to *The Mortmain Act* is contained in a statute entitled *An Act to incorporate the Masonic Temple Association of Winnipeg,* ch. 50, Acts 1895. Sec. 2 provides that the corporation

shall have power * * to * * receive by gift, or devise (without being subject to any law of Mortmain) * * any real and personal estate * *

The last reference is to be found in ch. 140 of the Statutes of 1914, entitled *An Act to incorporate the Confederation of Polish Catholic Societies in Canada.* Sec. 4 enacts as follows:

Notwithstanding the statutes of Mortmain or any statute of the Province, the said corporation may * * receive * * property * * devised or bequeathed to it * *.

I cannot hold that these casual references to *The Mortmain Act* have the effect of introducing it into the laws of the province. My view is that the references in the several statutes above quoted were inserted merely *ex abundanti cautela.*

Finally it is said that we should follow the decision of Richards, J., in *Law v. Acton,* (1902) 14 Man. R. 246, holding that *The Mortmain Act* is in force in Manitoba. It is urged that even if the decision of Richards, J. is wrong,

still the inconvenience caused by unsettling the law, and disturbing what was quiet is so great that . . . even a Court of Error should be slow to reverse decisions, which, though originally wrong, have long been uniform. [Blackburn, J. in *Jones v. Mersey Docks and Harbour Board,* 11 Jur. (N.S.) 746, at p. 750].

If in *Law v. Acton, supra,* Richards, J. had held that *The Mortmain Act* was not in force in Manitoba and we proposed to reverse him, the case would be entirely different, and many titles might be interfered with. I fail to see how any titles can be dependent on a decision which holds that the Act is not in force.

In *Bourne v. Keane* [1919] A.C. 815, 89 L.J. Ch. 17, the question was whether a bequest of personal property for masses for the dead was void as a gift to superstitious uses. The

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uthorities in England, beginning with *West v. Shuttleworth* 1835) 2 Myl. & K. 684, 4 L.J. Ch. 115, and continuing own to 1919, had consistently held such disposition of pro- erty to be void. The House of Lords overruled these de- sions. The language of Lord Birkenhead, L.C., is directly pplicable to this case. At p. 860, he said:

In my view it is undoubtedly true that ancient decisions are not to be ghtly disturbed when men have accepted them and regulated their dis- positions in reliance upon them. And this doctrine is especially deserving respect in cases where title has passed from man to man in reliance on a sustained trend of judicial opinion.

But this, my Lords, is not the present case. If my view is well founded, tizens of this country have for generations mistakenly held themselves ecluded from making these dispositions. I cannot conceive that it is my nction as a Judge of the Supreme Appellate Court of this country to ake error perpetual in a matter of this kind.

For the reasons above set forth, I hold that the imperial tatute, 9 Geo. II., ch. 36, is not in force in Manitoba.

DENNISTOUN, J.A.—The main question for decision upon is appeal is whether or not the Statute 9 Geo. II., ch. 36, ommonly called *The Mortmain Act,* is in force in Manitoba.

The matter has been ably argued by counsel who agree that ie statute if it be a part of the law of this province, became ich by reason of sec. 1 of *The Queen's Bench Act,* passed by ie provincial Legislature in 1874, 38 Vict., ch. 12, which nacted that

e court may and shall with or without a jury, as provided by law, decide id determine all matters of controversy relative to property and civil ghts, both legal and equitable, according to the laws existing or estab- shed and being in England, as such were, existed and stood, on the fif- enth day of July in the year 1870, so far as the same can be made ap- icable to matters relating to property and civil rights in this Province.

It is, therefore, necessary to inquire whether the statute is ie which is or ever was or can be made applicable to condi- ons existing in Manitoba.

The judgment of Sir William Grant, Master of the Rolls, ronounced in the case of *Atty.-Gen. v. Stewart* (1817) 2 Ier. 144, (16 R.R. 162), decides that *The Mortmain Act,* 9 eo. II., was not introduced into the Island of Grenada with ie general body of English law. By the King's proclama- on of 1763 it was declared that until a general assembly

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should be summoned to made and ordain laws, statutes and ordinances, all persons were to confide in the royal protection for the enjoyment of the benefit of the laws of England, for which purpose power was given to the governor of the colony of Grenada with the advice of the council to erect Courts of judicature for hearing and determining all causes as well as criminal as civil according to law or equity and as near as might be agreeable to the law of England.

Sir William Grant bases his judgment on the ground that the statute was not applicable to an English colony for a number of reasons. At p. 160 of *Merrivale's Report,* he says:

> Whether the statute of mortmain be in force in the island of Grenada, will, as it seems to me, depend on this consideration—whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed. I conceive that the object of the statute of mortmain was wholly political—that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed to be a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation * * * The thing to be prevented was a mischief existing in England, and it was by the quality and extent of the mischief, as it there existed, that the propriety of legislative interference upon the subject was to be determined. The statute begins by referring to the ancient laws made against alienation in mortmain. None of the causes in which those laws originated had ever had an existence in the colonies. It then recites, that this public mischief had of late greatly increased. There is locality in that assertion.

He then goes on to show that the exception of English universities and schools from the operation of the Act clearly shows that it was intended to be local in its operation, and to paraphrase his language, if this statute were in force in Manitoba the consequence would be that a testator could not by will give an acre of land for the support of a school in the province, while he might give his whole estate to augment the endowments of an English college.

The Master of the Rolls then deals with alienations in mortmain *inter vivos* which are not prohibited but regulated and shows that the provisions for enrolment are of so local a character as to be quite inapplicable to Grenada or any other colony.

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He concludes:

If the Legislature of the island think any measure of the same kind necessary, they may so shape and modify it, as to adapt it to their own circumstances and situation. * * * In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly *English*, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred as it stands into the code of any other country.

The exclusion of Scotland from the operation of the statute in express terms, is a clear indication that it was not considered to be generally applicable throughout the British Isles by the Legislature which passed it. Sir William Grant's reasoning that it was local in its character and design is, to my mind, convincing.

Chief Justice Robinson, discussing the like question in *Doe d. Anderson v. Todd,* 2 U.C.Q.B. 82, at p. 88, and referring to the judgment of Sir W. Grant in *Atty.-Gen. v. Stewart,* says:

I think the reasoning of the Master of the Rolls, as applied to the particular provisions and exceptions in that statute, is obvious and irresistible, and that it would lead us to say, that the legislature if they had given no other evidence of their intention than is to be found in the statute 32 Geo. III, ch. 1, did not intend by that act to introduce the statutes of Mortmain among which the 9th Geo. II is usually though not very accurately classed.

Chief Justice Robinson's opinions on all subjects connected with the introduction and development of colonial jurisprudence have always been recognized as of the greatest weight and authority and are read by the present generation of lawyers with the highest respect.

If he had felt free to exercise his own judgment he would undoubtedly have held that the Mortmain Acts had not been introduced into Upper Canada with the general body of English law, but he came to the conclusion that the Legislature of the province by certain references to the Statutes of Mortmain had, so to speak, by estoppel, precluded the Courts from so holding.

In *Whitby Corporation v. Liscombe,* 23 Gr. 1, a strong Court composed of Draper, C.J., Burton, Patterson and Moss, JJ., followed the decision in *Doe d. Anderson v. Todd, supra,* as had been done in other cases in Ontario, such as

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Davidson v. Boomer, 15 Gr. 1; *Hambly v. Fuller,* 22 U.C.C.P. 141; *Doe d. Bowman v. Cameron,* 4 U.C.R. 155; *Hallock v. Wilson,* 7 U.C.C.P. 28; and *Mercer v. Hewston,* 9 U.C.C.P. 349; but throughout the judgments there are to be found strong expressions of approval of the reasoning of Sir William Grant in *Atty.-Gen. v. Stewart, supra,* and several intimations that had the matter been *res integra* the Ontario Judges would have come to an opposite conclusion. They felt that the Legislature had so unequivocally intimated that *The Mortmain Act* was in force in Upper Canada, and so long a time had elapsed since that position has been first taken by the Courts, that the doctrine *stare decisis* should prevail, and the introduction of an element of uncertainty avoided by standing fast to the legal policy laid down by Chief Justice Robinson in *Doe d. Anderson v. Todd, supra.*

If the Statutes of Mortmain were not applicable they were not introduced into Manitoba by the statute of 1874 with the general body of English law, and could not thereafter be introduced except by express enactment.

When the Legislature in 1884, dealing with the Methodist Church, made reference to "any statute or statutes of mortmain," and in 1895 enabled the Masonic Temple Association to receive land by devise "without being subject to any law of mortmain," and in 1914 gave powers to the Polish Catholic Societies of Canada "notwithstanding the statutes of mortmain" such references were, in my opinion, made in deference to the apprehensive and excessive caution of the draftsman of what were in reality private bills and in no way indicated that in the opinion of the Legislature the English Mortmain Acts were in force in Manitoba.

Even if the contrary were the fact and the legislators believed that the Mortmain Acts were in force, how could such a mistake operate to bring into existence a law which was not introduced with the general body of English law for the reasons so ably set forth by Sir W. Grant and Chief Justice Robinson? Nothing short of direct legislation could, in my opinion, bring about such a result.

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Repeated references in recent Manitoba incorporating statutes to the *Mortmain and Charitable Uses Act,* which it is declared shall not stand in the way of devises and bequests to religious corporations, show how absurd it is to take such references by the Legislature as having any legislative effect whatever. The statute referred to was not passed in England until 1908 and could under no possible circumstances have any force in Manitoba, and previous references to "The statutes of Mortmain" or "license in mortmain" have no greater effect.

The Mortmain Acts have been held not to be in force in New South Wales: *Whicker v. Hume* (1858) 7 H.L. Cas. 124, 28 L.J. Ch. 396; British Honduras, *Jex v. McKinney,* 14 App. Cas. 77, 58 L.J.P.C. 67; British Columbia, *In re Pearse Estate,* 3 B.C.R. 280; Saskatchewan, *In re Miller Estate,* 11 Sask. L.R. 76, [1918] 1 W.W.R. 929, following the decision in *Attorney-Gen. v. Stewart, supra,* and against these decisions we have *Doe d. Anderson v. Todd, supra,* in Ontario; and *Law v. Acton,* 14 Man. R. 246, by which the late Mr. Justice Richards decided that the Mortmain Acts were in force in Manitoba and that he should be guided by the decision in *Doe d. Anderson v. Todd, supra.*

Mr. Justice Galt, who tried this case, considered that he was bound to follow the judgment in *Law v. Acton, supra,* but his reasoning, with which I agree, leads to the conclusion that he would approve a reversal of his judgment (*ante,* p. 245). This is the first occasion upon which this question has come before a Court of Appeal in this province and for the reasons given by the Lord Chancellor in *Bourne v. Keane* [1919] A.C. 815, 89 L.J. Ch. 17, I am of opinion that it is better to overrule *Law v. Acton, supra,* and to allow this appeal rather than perpetuate an error which has had the effect of depriving charitably disposed persons from carrying their intentions into effect.

If at any time it is felt by the Legislature that the absence of such laws has occasioned "a public mischief," as 9 Geo. II. calls it, a statute can be passed to cure the evil.

I would allow the appeal of the Attorney-General and set aside the judgment of the Court of King's Bench and remit

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the cause to that Court for the settlement of a scheme for the administration of the trust for charitable uses created by the will of the testatrix.

Costs of all parties should be paid out of the estate as between solicitor and client.

Appeal allowed.

COURT OF APPEAL

BEST v. DUSSESSOYE ET AL

Before PERDUE, C.J.M., CAMERON, HAGGART and DENNISTOUN, JJ.A.

Sale of Land — Default by Purchaser — Order of Court Determining Agreement—No Right to Reopen and Redeem—Distinction from Case of Mortgage.

In an action by a vendor for default in payment under an agreement of sale of land, when the time fixed by the Court for payment has expired and an order has been made determining the agreement and foreclosing the rights of those claiming under or through it, there is no jurisdiction in the Court to reopen the matter and allow redemption. The doctrine of the Courts of Chancery that a mortgagee is liable to be redeemed after he has obtained a final order of foreclosure is not applicable to the case of a vendor and purchaser. Judgment of Galt, J. affirmed, Haggart, J.A. dissenting.

Practice — Order for Cancellation of Agreement of Sale of Land — Final Order—By Whom to Be Made.

If after the time fixed for payment a final order is necessary to cancel an agreement of sale of land it should be made by a Judge in Court or by a Judge in Chambers exercising the powers of the Court under R. 462 and not by the Referee in Chambers (per Perdue, C.J.M.). If the first order was the effective one and the final order is merely in accordance therewith and as directed thereby and for the purpose of showing the fact of cancellation it may be made by the Referee in Chambers (per Dennistoun, J.A.).

ARGUED: 30th March, 1920.
DECIDED: 26th April, 1920.

Statement.

APPEAL from judgment of Galt, J. allowing an appeal from an order of the Referee in chambers providing for the vacating of a final order of foreclosure of an agreement of sale of land and allowing redemption. Appeal dismissed, Haggart, J.A. dissenting.

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GALT, J.—This is an appeal from an order made by the Referee on November 25, 1919, whereby it was ordered that ne Muys be made a party defendant to the action and that pon payment by the Central Canada Investment Corporation imited of $5,453.81 into the chief branch of the Bank of Hamilton at Winnipeg, to the credit of the plaintiff and the ccountant of this Court, on or before December 2, 1919, the nal order of foreclosure made herein on October 10, 1919, be acated and set aside and that the plaintiff do stand redeemed.

The statement of claim shows that on June 16, 1913, the laintiff by agreement in writing agreed to sell to one Charles Muys, who agreed to purchase from the plaintiff, certain lands nerein set out for the price of $12,000, payable $2,750 by the urchaser transferring to the vendor certain other lands, 1,000 on January 1, March 1 and May 1, 1914, $1,575 on December 1, in the years 1914, 1915, and 1916, and $1,525 n December 1, 1917, together with interest, etc., until the whole of said moneys were fully paid.

The said Charles Muys convenanted to pay the said moneys, nd it is further provided that time should be the essence of ne agreement.

The plaintiff alleges his willingness and offers to carry out aid agreement on his part. He then proceeds to allege (par.) that on or about February 3, 1916, said Charles Muys as- gned all his interests in said agreement and lands to the de- endant the Central Canada Investment Corporation by way f security, and that on or about July 11, 1918, said Charles Muys executed a quit-claim deed in favour of the defendant yril Dussessoye.

The plaintiff claims: (1) A reference to the Master to take n account of the moneys due to the plaintiff, and that a time e fixed by the Court for payment of the amount found to be ue and that in default of payment being made within the time o fixed, the payments already made under said agreement nay be declared forfeited, and that said agreement for sale e declared cancelled and rescinded and at an end, and that ne defendants do stand absolutely debarred and foreclosed of

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and from all rights, title, interest and claim to, in, for and out of the said lands referred to in the said agreement;

(2) That for the purpose aforesaid all proper directions may be given and accounts taken;

(3) That caveat filed by Central Canada Investment Corporation be vacated;

(4) Further and other relief.

The defendant Dussessoye allowed judgment to go by default. The defendant corporation put in a defence disputing the amount claimed by the plaintiff and claiming an account. The action then proceeded to trial and judgment was pronounced declaring plaintiff entitled to have the agreement specifically performed and ordering an account; and it was further ordered that in the event of the defendants or the encumbrancers, if any, who prove their claim making default in payment according to the report of the said Master, that the said agreement for sale be declared determined, rescinded, cancelled, foreclosed and at an end and be delivered up to the plaintiff, and that payments made thereunder be declared forfeited, and that all improvements made upon the said lands be declared the property of the plaintiff, and that the defendants deliver to the plaintiff immediate possession of the said lands and that the defendants and the said encumbrancers, if any, who prove their claim stand absolutely debarred and foreclosed of and from all equity of redemption, in and to the said lands, and that any caveats filed by the said defendant or any person claiming through or under them be vacated and discharged and that the plaintiff shall be entitled to an order on application therefor.

The Master made his report on the reference, finding that there was due to the plaintiff for principal money, interest and costs, the sum of $5,404.95, payable to the joint credit of the plaintiff and the accountant of this Court at the Bank of Hamilton, between the hours of ten o'clock in the forenoon and one o'clock in the afternoon of October 8, 1919.

The Central Canada Investment Corporation intended to pay the above amount, but owing to the absence from town of

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r. E. J. McMurray and a misapprehension of the practice Mr. Davidson (solicitors for the defendant corporation), fault was made in paying the money into bank on the day ed. The plaintiff was not in any respect aware of or re- onsible for the default.

On October 11, 1919, the plaintiff applied for and obtained order from the Referee cancelling the agreement of sale, rfeiting the moneys theretofore paid and foreclosing all the fendants' equities of redemption. This order appears to ve been duly entered on October 14, 1919. Thereupon the intiff entered into an agreement with Mary Muys, wife of arles Muys, for the sale of the property to her and gave her option for valuable consideration to purchase the lands at ixed date in 1920, for the sum of $5,650.

On or about October 22, 1919, the defendant corporation plied to the Referee to reopen the matter and permit them pay what was due to the plaintiff into the bank. It was on s application that the Referee made the order now in appeal.

The relationship existing between the vendor of real estate d the purchaser has formed the subject of many decisions, ecially in recent years. Several of these decisions have en collected by *Mr. McCaul* in his work on *Remedies of ndors and Purchasers.* (See second edition, pp. 116, *et seq.*)

The analogy, and also the distinction, between cases of ven- r and purchaser, and of mortgagee and mortgagor, have ten formed the subject of comment in actions brought by ndors or purchasers. For instance, in *Seton v. Slade,* 7 Ves. 5 (32 E.R. 108) Lord Chancellor Eldon says, at p. 273:

To say, time is regarded in this Court, as at law, is quite impossible. e case mentioned of a mortgage is very strong; an express contract der hand and seal. At law the mortgagee is under no obligation to convey at that particular day; and yet this Court says, that, though the ney is not paid at the time stipulated, if paid with interest at the time re-conveyance is demanded, there shall be a re-conveyance; upon this ound; that the contract is in this Court considered a mere loan of ney, secured by a pledge of the estate. But that is a doctrine, upon ich this Court acts against what is the *prima facie* import of the terms the agreement itself; which does not import at law, that, once a mort- ge, always a mortgage; but Equity says that; and the doctrine of this urt as to redemption does give countenance to that strong declaration

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of Lord Thurlow, that the agreement of the parties will not alter it; for I take it to be so in the case of a mortgage; that you shall not by special terms alter what this Court says are the special terms of that contract. Whether that is to be applied to the case of a purchase is a different consideration. I only say, time is not regarded here as at law * * * * * * * * * *

But there is another circumstance. The effect of a contract for purchase is very different at Law and in Equity. At Law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be to be discussed between the representatives of the vendee.

In *Parkin v. Thorold* (1852) 16 Beav. 59, 16 Jur. 959, the plaintiff agreed to sell to the defendant a freehold estate. The abstract was to be delivered within 10 days, and by the fifth condition of sale it was stipulated as follows: The purchaser shall pay a deposit,

and sign an agreement for completing the purchase and for payment of the residue of the purchase-money on or before the 25th of October next,

at the office of Mr. F., "at which time and place the purchase is to be completed."

There was no stipulation in the agreement that time should be of the essence of the contract. Delays occurred on the part of the plaintiff in making title within the time but he succeeded in making title, notwithstanding objection of the defendant, within a reasonable time after the day fixed.

Sir John Romilly, Master of the Rolls, granted to the plaintiff a decree for specific performance. He says, at p. 65 (16 Beav.):

At law, time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not a doctrine of a Court of Equity; and although the *dictum* of Lord Thurlow, that time could not be made of the essence of the contract in equity, has long been exploded, yet time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication.

Then again at p. 67: (16 Beav.):

Neither will equity enforce a contract, where, though the Court considers the title good, yet considers it sufficiently doubtful that it might reasonably give rise to litigation hereafter between the purchasers and persons not bound by the decree of the Court in the suit for specific

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formance. It is, I apprehend, on a similar principle, that the Court regarded the question of time in these matters, when it has not been ifically and precisely contracted for, as an essential clause in the con-t. It then considers how far either party is injured by the delay, and not permit one to insist upon that, which, although a formal part of contract, would, in reality, defeat the object which both had in view, ne time when it was made. It is, I apprehend, on a similar principle , that the whole doctrine relating to equities of redemption, as ad-istered by this Court, is founded. The contract between the mortgagor mortgagee is precise; if the money and interest is not repaid on the twelve-month on which the mortgage is made, the estate is to be the perty of the mortgagee: the contract is positive and unambiguous, but ourt of Equity will not permit that contract to be enforced, and will rain the parties from enforcing it at law. It treats the substance of the ract to be security for the repayment of money advanced, and that ion of the contract which gives the estate to the mortgagee as mere n; and accordingly, in direct violation of the contract, it compels the tgagee, so soon as he has been repaid his principal money and interest the costs he has been put to, to restore the estate: and this, although parties have acted on the contract, and the mortgagee has taken pos-ion on the day when default arose, and has continued in possession for y years.

n *Lysaght v. Edwards*, 2 Ch. D. 499, 45 L.J. Ch. 554, sel, M.R. says, at p. 506:

appears to me that the effect of a contract for sale has been settled more than two centuries; certainly it was completely settled before time of Lord Hardwicke, who speaks of the settled doctrine of the rt as to it. What is that doctrine? It is that the moment you have lid contract for sale the vendor becomes in equity a trustee for the haser of the estate sold, and the beneficial ownership passes to the haser, the vendor having a right to the purchase-money, a charge or on the estate for security of that purchase-money, and a right to in possession of the estate until the purchase-money is paid, in the nce of express contract as to the time of delivering possession. In r words, the position of the vendor is something between what has n called a naked or bare trustee, or a mere trustee (that is, a person out beneficial interest), and a mortgagee who is not in equity (any e than a vendor), the owner of the estate, but is, in certain events, tled to what the unpaid vendor is, viz., possession of the estate and a rge upon the estate for his purchase-money. Their positions are analo-s in another way. The unpaid mortgagee has a right to foreclosure, is to say, he has a right to say to the mortgagor, "Either pay me in a limited time, or you lose your estate," and in default of payment becomes absolute owner of it. So, although there has been a valid con-t of sale, the vendor has a similar right in a Court of Equity; he has a t to say to the purchaser, "Either pay me the purchase-money, or lose estate." Such a decree has sometimes been called a decree for can-ation of the contract; time is given by a decree of the Court of Equity, now by a judgment of the High Court of Justice; and if the time ex-

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pires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate. But that, as it appears to me, is a totally different thing from the contract being cancelled because there was some equitable ground for setting it aside.

The above authorities recognize an analogy in certain respects between the respective positions of vendor and purchaser and of mortgagee and mortgagor. In those respects in which the analogy holds good there would seem to be no reason for refusing to a litigant in one category the relief he would be entitled to in the other, for instance, where time has not been made of the essence of an agreement for sale, there would seem to be no reason for refusing relief to a vendor or purchaser even although the time specified for completion had passed, but where time is made of the essence of an agreement, Courts of Equity refuse to aid the party in default, even where it is clear that all parties concerned were anxious to carry out the sale and that the very slight delay was due to the unexpected illness of the solicitor for one of the parties. See *Brickles v. Snell* [1916] 2 A.C. 599, 86 L.J.P.C. 22, [1917] 1 W.W.R. 1059.

The relationship of mortgagee and mortgagor has always been regarded as anomalous. A Court of Equity will not regard even express stipulations by the mortgagor, either as to time or any other circumstances which would clog or fetter his right of redemption. The expression, "once a mortgage, always a mortgage," has passed into current use, and accordingly a mortgagee, even after obtaining a final order of foreclosure, is liable to discover that there is nothing "final" in his order except the word itself. See *Campbell v. Holyland*, 7 Ch. D. 166, 47 L.J. Ch. 145.

In *Salt v. Marquess of Northampton* [1892] A.C. 1, 61 L.J. Ch. 49, an agreement had been drawn up between the trustees of an insurance society and Earl Compton (son of the Marquess of Northampton), whereby the insurance society loaned certain moneys to Earl Compton and at the same time insured his life to the extent of £34,500. Earl Compton executed a bond charging his reversion (to which he would be entitled on the death of his father) in favour of the society.

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Apparently great care was taken by the solicitors in the transaction to prevent the document from being in any way regarded as a mortgage. The Earl died in his father's life time and the Marquess brought action to recover the insurance moneys which had been made payable to the society itself, but the House of Lords held that the effect of the agreement, was to create a mortgage and for that reason the Marquess was found entitled to the balance of the insurance moneys after payment of the loan.

In delivering judgment, Lord Bramwell, at p. 18 ([1892] A.C.), uses the following characteristic language with regard to the anomalous relationship of mortgagee and mortgagor:

> My Lords, the first thing I find necessary to do in this case is to learn and familiarize myself with the law which governs it, and its language. Of course, one knows in a general, if not in a critical way, what is an equity of redemption. It is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender, I suppose one may say by a debtor to a creditor, on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties the securities were to be the absolute property of the creditor. This is not a legal right in the debtor. Whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise ones, rather than relieve them when they had done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise. And probably to undo this would be more costly and troublesome than to continue it.

It is not difficult to understand why practitioners and Courts should borrow terms originally applicable only to cases between mortgagee and mortgagor, and apply them where the positions happen to be analogous, to cases of vendor and purchaser. There is no authority for such a maxim as "once an agreement of sale, always an agreement of sale."

In the present case the judgment of the Court was delivered in March last, and expressly provided that in the event of the defendants, or encumbrancers, if any, making default in payment of the amount to be found due by the Master, the said agreement for sale be declared determined, rescinded, cancelled, foreclosed and at an end, and be delivered up to the

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plaintiff and that payments made thereunder be declared forfeited and that all improvements made upon the said lands be declared the property to the plaintiff and that the defendants deliver to the plaintiff immediate possession of the said lands and that the defendants and the said encumbrancers, if any, who prove their claim stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said lands and that any caveats filed by the said defendants or any persons claiming through or under them be vacated and discharged and that the plaintiff shall be entitled to an order on application therefor.

Default having been made by the defendants the plaintiff was entitled, under the last clause of the judgment, to apply for and obtain an order awarding him the relief recited in the judgment. Similar relief is recognized in Ontario, including both forfeiture of moneys paid, and rescission of the contract: See *Jackson v. Scott,* 1 O.L.R. 488.

Such an order may be made *ex parte* as in *Clark v. Wallis,* 35 Beav. 460.

If the order were a final order of foreclosure in a mortgage action the order reopening the foreclosure would, under the circumstances disclosed before the Referee, be granted almost as a matter of course. But the order in question is of a wholly different character. The plaintiff's application for the order cancelling the agreement, etc., was strictly in accordance with the judgment of the Court; and when once it had been granted and entered the Referee's powers were exhausted, and he became *functus office.* The order could not, in my opinion, be set aside or varied except on appeal; and no appeal was taken.

In order to bring a case within the principles laid down by Sir George Jessel in *Campbell v. Holyland, supra,* it is not sufficient that the case be merely analogous to the case of a mortgage, it must not merely be *ejusdem generis* but *sui generis.*

The litigation having come to an end by the order cancelling the agreement would be all reopened with an additional party added under the order in appeal. I think that the maxim *interest reipublicae ut sit finis litium* applies to such a case. As

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result the appeal must be allowed and the order of the Re-
ree discharged.

The appellant Mary Muys is entitled to the costs of the mo-
on before the Referee and of this appeal.

Defendant, Central Canada Investment Corporation Lim-
ed, appealed.

C. P. Wilson, K.C. and *H. W. H. Knott,* for defendant,
ppellant, Central Canada Investment Corporation Limited.
C. H. Locke, for defendant, respondent, Muys.

PERDUE, C.J.M.—The plaintiff in this action is the vendor
an agreement for the sale of land. The following facts are
eged in the statement of claim: The purchaser, one Charles
uys, entered into an agreement in writing dated June 16,
13, to purchase certain farm lands from the plaintiff for
e sum of $12,000. Of the purchase-money $2,750 was paid
Muys transferring to the plaintiff another piece of land.
ie rest of the purchase-money was made payable in instal-
ents falling due on certain dates in the years 1914, 1915,
16 and 1917. The final payment fell due on December 1,
17. Interest at six per cent per annum was to be paid on the
iount from time to time remaining unpaid. On February
1916, Muys assigned all his interest in the agreement and in
e land to the defendants, the Central Canada Investment
rporation, Limited, as a security. This assignment was
gistered by way of caveat in the land titles office.

On July 11, 1918, Muys executed a quit-claim deed of the
id to the defendant Dussessoye. In the agreement between
e plaintiff and Muys it was provided that "time should be
every respect the essence of the agreement." At the time
filing the statement of claim, namely, December 12, 1918,
ere was still due for purchase-money the sum of $3,892.30
d for interest the sum of $1,011.

Par. 7 of the statement of claim is as follows: "The plain-
f is willing and hereby offers to carry out the said agree-
ent on his part."

The relief claimed by the plaintiff is:

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That it be referred to the Master of this Honorable Court to take the account of the amount due to the Plaintiff under and by virtue of the said agreement for sale and that a time may be fixed by this Honorable Court for payment of the amount so found to be due and that in default of payment being made within the time so fixed, that the payments already made under the said agreement may be declared forfeited and that the said agreement for sale be declared cancelled and rescinded and at an end, and that the Defendants do stand absolutely debarred and foreclosed of and from all right, title, interest and claim to, in, for and out of the said lands referred to in the said agreement and described in paragraph 3 hereof.

A defence was put in by the Central Canada Investment Corporation, Limited, whom I shall call the corporation, disputing the amount due, claiming that Muys should be a party to the suit, and setting up *The Moratorium Act*, 1915, ch. 88. The corporation, however, did not ask for a return of the purchase-money in the event of cancellation.

The judgment declares that the plaintiff is entitled to have the agreement "specifically performed by the defendants" and orders and adjudges the same accordingly. It then proceeds to order "that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for the cancellation and foreclosure of the agreement," and refers it to the Master to take an account of the amount due to the plaintiff, etc., and that the Master do appoint a day three months after the making of his report for the payment by the defendants of the amount found due. The judgment also directs an enquiry as to subsequent encumbrancers, that they be notified to come in and prove their claims, etc., also, that in case any of the encumbrancers neglects to prove his claim that his interest in the land be foreclosed. The judgment then orders that in the event of the defendants or the encumbrancers making default in payment according to the report of the Master, that the agreement for sale

be declared determined, rescinded, cancelled, foreclosed and at an end and be delivered up to the plaintiff, and that payments made thereunder be declared forfeited and that all improvements made upon the said lands be declared the property of the plaintiff;

that possession of the land be delivered to the plaintiff; that the defendants and the encumbrancers, if any, who prove their claims "stand absolutely debarred and foreclosed of and from

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l equity of redemption in and to the said lands"; that any aveats filed by the defendants or any persons claiming rough or under them be vacated and discharged, "and that e plaintiff shall be entitled to an order on their [*sic*] appli-tion therefor."

The reference directed by the judgment took place before e Master, who made his report on July 8, 1919. He found e amount due to the plaintiff on that date for principal and terest to be $5,331.34. He calculated subsequent interest r three months to be $73.61, and this sum added to the other ade $5,404.95 as the full amount due to the plaintiff on Oc-ber 8, 1919, which was appointed as the last day for re-emption being three calendar months after the making of the port.

The corporation intended to make payment in accordance ith the report, but by reason of the absence from town of eir solicitor who was in charge of the matter, the money was ot paid by the day appointed. The plaintiff thereupon ap-ied to and obtained from the Referee in Chambers an order, ated October 11, 1919, by which it is ordered that the agree-ent of sale be cancelled, determined and at an end, that the efendants do stand absolutely debarred and foreclosed of and rom all equity of redemption in the lands, that all payments ade under the agreement are forfeited, that all improve-ents made on the lands are the property of the plaintiff, and at the defendants deliver up to the plaintiff immediate pos-ession of the lands. It also orders that any caveat filed by e defendants be vacated and discharged.

On October 22, 1919, the corporation served on the plaintiff otice of motion before the Referee in Chambers for an order acating the final order of foreclosure, allowing the applicant to redeem and extending the time for redemption. In the eantime it had transpired that the plaintiff on the same day at the final order was made accepted a proposal from Mary Muys, the wife of the original purchaser Charles Muys, to urchase the land for the price of $5,650 and he afterwards, n consideration of $100, gave her an option until April 1, 920, to buy at this price. On the motion before the Referee n November 25 , 1919, Mary Muys was made a party to the

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suit and it was ordered that upon payment of the sum of $5,453.81 into the Bank of Hamilton to the joint credit of the plaintiff and the accountant of the Court, on or before December 2, 1919, the final order of foreclosure be vacated and the plaintiff stand redeemed. It was admitted on the argument that the corporation paid in the redemption money in accordance with the terms of the order. From this order Mary Muys appealed to a Judge in Chambers. The appeal was heard by Mr. Justice Galt and allowed by him ([1920] 1 W.W.R. 494). From this last order the present appeal to this Court is brought.

It is important to note that the plaintiff in his statement of claim alleged that he was willing to carry out the agreement on his part and offered to do so (par. 7). By this offer, it seems to me, the plaintiff waived the default of the purchaser and those claiming under him. In *Kilmer v. B.C. Orchard Lands, Ltd.* [1913] A.C. 319, 82 L.J.P.C. 77, 3 W.W.R. 1119, by the terms of the agreement for sale the purchase-money, together with interest was payable by instalments at specified dates. Time was declared to be of the essence of the agreement. In default of punctual payment at an appointed date of the instalment of purchase-money and the interest then payable or any part thereof, the agreement was to be null and void; all payments made under the agreement were to be absolutely forfeited to the vendor, and the vendor was to be at liberty to resell the property immediately. The vendor brought an action for cancellation of the agreement. The purchaser counterclaimed for specific performance and the money due was paid into Court. The trial Judge dismissed the action and decided in favour of the purchaser on the counterclaim (17 B.C.R. 230). The Court of Appeal reversed the trial Judge (17 B.C.R. 230, 2 W.W.R. 91, 20 W.L.R. 892) and the purchaser appealed to the Privy Council. Lord Macnaghten, who prepared the judgment of the Judicial Committee, pointed out that the respondents, the vendors, had extended the time for the payment of the second instalment. When the extended time elapsed without payment being made the vendors brought the action. His Lordship held that the case was brought entirely within the ruling in *In re Dagenham (Thames) Dock*

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o., L.R. 8 Ch. 1022, 43 L.J. Ch. 261, that it was even a ronger case, for the penalty, if enforced according to the tter of the agreement, became more and more severe as the greement approached completion, and the money liable to onfiscation became larger. The appeal, therefore, was al-wed and the judgment of the trial Judge restored, which ave the purchaser the right to specific performance.

In *Steedman v. Drinkle* [1916] 1 A.C. 275, 85 L.J.P.C. 79, W.W.R. 1146, 33 W.L.R. 483, the above case came up for iscussion. In the *Steedman Case* it was held that the parties aving made time of the essence of the agreement specific per-ormance would not be granted at the suit of purchasers who ere in default in payment of part of the purchase-money. ord Haldane in delivering the judgment of the Board, after eferring to the judgment in the *Kilmer Case, supra*, in so far s it gave relief against the forfeiture, proceeded as follows:

So far the decision, which merely applied a well-known principle, is asy to follow, and in their Lordships' opinion so far it governs the pres-nt case. But the Board went on to decree specific performance. As me was declared to be of the essence of the agreement, this could only ave been decreed if their Lordships were of opinion that the stipulation to time had ceased to be applicable. On examining the facts which ere before the Board it appears that their Lordships proceeded on the ew that this was so. The date of payment of the instalment which was ot paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the urchaser contended that when the company had submitted to postpone e date of payment they could not any longer insist that time was of the ssence. Their Lordships appear to have adopted this view, and on that ooting alone to have decreed specific performance as counterclaimed.

In *Tooley v. Hadwen*, 13 Alta. L.R. 447, [1918] 2 W.W.R. 12, Walsh, J. held that the effect of the *Kilmer Case* as above xplained by Lord Haldane is that where time is expressed to e of the essence of a contract, consent to an extension of the me, even to another definite date, prevents time from being ny longer of the essence of the contract.

The remedy to which a purchaser who made default is en-itled is shown in *Brickles v. Snell* [1916] 2 A.C. 599, 86 .J.P.C. 22, [1917] 1 W.W.R. 1059. He cannot claim spe-ific performance if he is in default—unless, as pointed out n *Steedman v. Drinkle, supra*, the default has been waived by

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the vendor; but he may apply to be repaid the money paid on account of the purchase, less, of course, the loss and damage sustained by the vendor through the purchaser's default. This rule was recently applied by the Appellate Division of the Supreme Court in Ontario in the case of a contract for the sale of goods: *Brown v. Walsh,* 45 O.L.R. 646, 16 O.W.N. 285. Meredith, C.J.C.P., after referring to the *Brickles Case, supra,* and the *Steedman Case, supra,* said:

> So that the Privy Council at all events has gone pretty near to the rule that if the seller be fully compensated that is enough; a very reasonable rule, at all events under ordinary circumstances.

The above decisions are of importance in the present case in showing how far the Courts will go in relieving against a forfeiture. In this case the plaintiff offers to carry out the agreement. He asks that an account be taken by the Court of the amount due to him under the agreement and that a time be fixed for payment. This offer in itself does away with the condition that time is of the essence of the contract, and all provisions for forfeiture of moneys, improvements, etc., based upon that condition should fall with it. Plaintiff does not set out or allege in his statement of claim any provision of the agreement giving to the plaintiff the right of forfeiture of the moneys paid on account in case the purchaser makes default. Judgment, however, was pronounced and entered in the form above mentioned declaring a cancellation of the agreement and a forfeiture of the moneys already paid unless the amount of unpaid purchase-money be paid on the day to be fixed by the Master. This judgment was not appealed from and binds the corporation.

Suits for the cancellation of contracts for the sale of land and the forfeiture of moneys paid by purchasers on account of purchase-money have been very common in this province. The form of action adopted from time to time is shown in *Hudson's Bay Co. v. Macdonald,* 4 Man. R. 237; 480; *West v. Lynch,* 5 Man R. 167; *Canadian Fairbanks Co. v. Johnston,* 18 Man. R. 589, 10 W.L.R. 571. In the last-mentioned case, Cameron, J., following Killam, J. in *Hudson's Bay Co. v. Macdonald, supra,* at p. 240, and Jessel, M.R. in *Lysaght v. Edwards,* 2 Ch. D. 506, suggested that one party to the con-

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fact may file a bill asking that a time may be fixed within which the other party may perform it and that, in default of such performance, it may be rescinded: *Canadian Fairbanks Co. v. Johnston, supra,* at p. 601.

In the judgment appealed from, Galt, J. pointed out the difference between the position of mortgagor and mortgagee on the one hand and purchaser and vendor on the other. This distinction is very clearly shown in the recent case of *Davidson v. Sharpe,* decided in the Supreme Court of Canada, [1920] 1 W.W.R. 888. The judgment in that case was that, in default of payment to the plaintiff of the amount found due, the defendant "thenceforth do stand absolutely debarred and foreclosed" from all right, title, interest and equity of redemption in and to the agreement and the lands, that the agreement be cancelled and the moneys paid thereunder be forfeited. After obtaining this judgment the vendor brought an action in another province against the purchaser on the covenant in the agreement. It was held that the plaintiff could not maintain the action, the agreement being at an end.

In the judgment in the present case the expression used is that the said agreement for sale be declared determined, rescinded, cancelled, foreclosed and at an end." It also declares that the payments made under the agreement be forfeited and that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said lands and that all caveats filed by the said defendants or any persons claiming through or under them be vacated and discharged, and that the plaintiff shall be entitled to an order on application therefor.

The reference to the "equity of redemption" seems to me to be needless. An equity of redemption is not involved in the case.

The view I take of the judgment is that it was intended that, on default in payment by the defendants, a final order might be taken out which would be of evidential value in clearing the title to the land. Liberty to apply was not expressly reserved by the judgment, but that was unnecessary under King's Bench Rule 653. Under that Rule any party

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may apply to the Court from time to time as he may be advised. Such application should be made to a Judge sitting in Court or exercising the powers of the Court. *Fritz v. Hobson,* 14 Ch. D. 542, at p. 561, 49 L.J. Ch. 735; *Poisson v. Robertson,* 86 L.T. 302, 50 W.R. 260.

Where there is judgment for specific performance, as there is in this case, and payment of the purchase-money has been ordered at the suit of the vendor, if the purchaser makes default in payment within the time appointed, the Court may on the application of the plaintiff order that the contract be rescinded. The application in that case is made to the Court: *Foligno v. Martin,* 16 Beav. 586; *Sweet v. Meredith,* 4 Giff. 207, 32 L.J. Ch. 147; *Henty v. Schroder,* 12 Ch. D. 666, 48 L.J. Ch. 792; *Clark v. Wallis,* 35 Beav. 460; *Hutchings v. Humphreys,* 54 L.J. Ch. 650, 52 L.T. 690. I agree with Mr. Justice Galt that the Referee in Chambers had no power to extend the time fixed for redemption under the judgment and Master's report. The powers conferred on the Referee by the rules and practice in regard to mortgage foreclosures do not extend to suits for specific performance, or cancellation of agreements for sale of land. If anything in the nature of a final order declaring the cancellation of the agreement is required—and I do not say that such an order is necessary—that order should, I think, under the above authorities be made by a Judge in Court or by a Judge in Chambers exercising the powers of the Court under Rule 462. It is only necessary to glance at the final order made in this suit by the Referee to see how widely it differs from the ordinary final order of foreclosure in a mortgage suit. The order is in fact a final or declaratory judgment. It declares that the agreement of sale is cancelled and determined, that the payments made under it are forfeited, that the improvements are the property of the plaintiff and the defendants are ordered to deliver to the plaintiff immediate possession of the land. But the order goes still further. It orders that any caveat filed by defendants or any person claiming under them be discharged. The effect of the order made by Mr. Justice Galt is that the Referee's order of October 11, 1919, stands, for whatever validity it may possess. I have reluctantly come to the conclusion that

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ie appeal must be dismissed. This leaves the matter in a ery unsatisfactory condition. The plaintiff, the vendor, re- ins the land and also the money paid, being much more than alf the purchase-money, besides interest. This is contrary the established equitable principle, that the vendor cannot ave the land and the purchase-money also: See *Davidson v. harpe, supra,* at p. 897. The balance of the money is now in ourt; the purchaser is anxious to complete the purchase; he as only prevented from doing so by a slip on the part of his olicitor. In such a case it would be unfortunate if some eans cannot be found to prevent so manifest an injustice om being perpetrated. Mrs. Muys is no longer a party to e suit, the order of November 25, 1919, making her a party aving been set aside. I cannot see how she is in a better posi- on than the plaintiff.

CAMERON, J.A.—This is an appeal from an order made by r Justice Galt allowing an appeal from an order made by e Referee extending the time for payment into Court under order previously made by him in the circumstances fully t forth in his judgment.

It is sought to make the doctrine of the Courts of Chancery at a mortgagee is liable to be redeemed after he has obtained final order of foreclosure applicable to the relations existing tween a vendor and purchaser under such an agreement as in question in this case. If this contention be upheld an tirely new departure will be established and a term added to e contract not hitherto recognized.

The rights of a mortgagor to reopen a final order of fore- osure are set out by Lord Jessel in the well-known case of *mpbell v. Holyland,* 7 Ch. D. 166, 47 L.J. Ch. 145, where foreclosure was opened up as against a purchaser after the te of the foreclosure absolute.

A mortgage, in the modern acceptation of the term in this country, is a curity created by contract for the payment of a debt already due or to come due, or of a present or future advance, effected by means of an tual or executory conveyance of real or personal property, charging the ortgaged property with the payment of the money secured, redeemable law only according to the strict legal conditions of the conveyance, but deemable in equity independently of such conditions, and enforceable, in

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default of payment, by foreclosure or sale in lieu thereof. [*Coote on Mortgages*, p. 6.]

According to the above definition, a mortgage arises out of contract between a debtor and a creditor for the payment of a debt or loan; and herein it is distinguished from a charge arising by operation of law, either under a judgment or charging order made by a Court of competent jurisdiction, or by way of lien as incident to contracts in which the parties stand in a relation to each other other than that of debtor and creditor by virtue of the mortgage contract itself, as, *e.g.*, vendor and purchaser, solicitor and client, and factor and principal. [*Ibid.*]

Some of the extraordinary characteristics that have been imposed upon a mortgage security are set forth in the judgment of Lord Bramwell in *Salt v. Northampton* (*Marquess*) [1892] A.C. 1, at p. 18, 61 L.J. Ch. 49, cited in Mr. Justice Galt's judgment. I quote the following further sentence from Lord Bramwell's decision:

It seems that a borrower was such a favourite with courts of equity that they would let him break his contract, and, perhaps, by disabling him from binding himself, disable him from contracting on the most advantageous terms to himself.

But the purchaser under the agreement in this case was not a borrower. He was not giving a security for payment of a debt. He entered into a contract with the vendor for the purchase of certain lands on certain terms of payment and otherwise on the performance of which the vendor agreed to convey and time was made the essence of the contract. Nothing has been paid on the agreement since November 2, 1916.

There is no reason and no authority to justify the imposition on such an agreement as that before us of a right to reopen the first order made by the Referee in the circumstances. To do so would be nothing short of judicial legislation. It might as in this case affect the rights a third party acquired in good faith. It would create an insecurity in the vendor's rights under his contract. It would be further enlarging the purchaser's rights and privileges against the vendor which are surely already sufficiently extensive.

As I understand the present situation in this province, the contention made by the appellant on this motion would, if given effect to, give the purchaser under an agreement of sale a privilege not enjoyed by a mortgagor under a mortgage pursuant to *The Real Property Act*. The section under which the

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Supreme Court decided *Williams v. Box*, 44 S.C.R. 1, was revealed in 1911.

The practice followed in this case of securing a rescission of the agreement through an action for specific performance has been well established in this province. There is no particular virtue in calling the order made pursuant to the judgment a final order of foreclosure. That is a term which is usually confined to a final order in an action for foreclosure of mortgage. But as applied to the first order of the Referee in this case it is merely descriptive and cannot affect its meaning and substance and to call it such has no legal effect. It might just as well be called an "order" or "final order" or "order pursuant to judgment" or "order for rescission."

I am fortified in these views by the recent decision of the Supreme Court in *Davidson v. Sharpe* [1920] 1 W.W.R. 888, where an action was brought by a vendor in Saskatchewan to recover on a judgment obtained against the defendant in the Supreme Court of British Columbia, or alternatively on the agreement for sale on which the action in British Columbia was taken. It was held that vendor could not recover. Mr. Justice Anglin says, p. 896:

> The anomalies introduced by Courts of equity in regard to the relations between mortgagor and mortgagee do not exist in regard to vendor and purchaser. A judgment or order declaring that on the happening of a certain event an agreement for sale shall be cancelled and at an end means precisely what it says and not merely that the plaintiff shall thereupon be entitled to have it cancelled and put an end to. When the purchaser under the order of the learned Chief Justice of British Columbia made default the agreement ceased to exist and the foundation for any right of personal recovery from the purchaser (except for costs) was gone. The purchaser had no further right to the land and the Court has no jurisdiction to restore him to his former position. The vendor has the land. He cannot have the purchase-money also.

In this present case the purchaser or those claiming under him has no further right to the land and the Court has no jurisdiction to restore them to their former position.

I think the order made by Mr. Justice Galt was right and this appeal must be dismissed.

HAGGART, J.A. (dissenting)—I think that substantial justice will be done in this case by allowing the defendants, The

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Central Canada Investment Corporation, Limited, to redeem. *McCaul* in his work on the *Remedies of Vendor and Purchaser* devotes a chapter, under the heading of "Definition of Forfeiture," to the discussion of the questions that were raised before us on the argument. The author there says:

> Here again the necessity of a clear definition of terms presents itself. Relief against forfeiture? Forfeiture of what? Is it the money that has been paid to the vendor and which he seeks to retain that is "forfeited," or is it the equitable estate of the purchaser, or both?

And in the author's text he cites very freely from the reasons of Stuart, J. in *C.P.R. v. Meadows,* 1 Alta. L.R. 344, 8 W.L.R. 806. I shall cite the author's words, which appear to me to be very applicable in the present case:

> At law the money had to be paid on the day named, but as long as the purchaser came in in a reasonable time and was not guilty of laches he could get specific performance if he went into equity. In granting specific performance at the suit of the vendor, the Court always fixed a day for the payment of the money necessarily much later than the date fixed in the agreement, and there are numerous cases where although the purchaser did not pay on that day, a new day was given. Surely this is relieving against a forfeiture. Moreover, such a course is, in my view, the only thing that can in strictness be called relieving against a forfeiture, I mean the course of preserving by postponement after postponement the rights of the purchaser under the agreement. What, it must be asked, is the right of the purchaser under the agreement which the Court will endeavour as long as possible to preserve from destruction? The right is simply to have a conveyance of the land upon payment of the purchase-money. The Court, I grant, will struggle to preserve that right for the purchaser as long as it possibly can, and does so by naming new days for the payment. But if the purchaser will not or cannot pay there comes a time when it is impossible to preserve his rights, simply because he is, in the last resort, the only one who can preserve them and that only by exercising them. The purchaser who has paid some money under an agreement of sale has, as I conceive it, two interests, first, *an interest in the property* to the extent of the money paid; second, a right to receive a title when he pays the balance. I agree that the Court may and ought, with certain limitations presently to be mentioned, to preserve the first from forfeiture. I agree also that it will, as long as possible, preserve the second right by postponement of the day for completion, but I cannot agree that when the Court lays its own hands upon the property and orders a sale, calling in a new purchaser and forcing a new agreement, it is thereby merely preserving from destruction the purchaser's rights under the agreement, which, as I have said, are merely that he may pay the purchase-money and receive a title. This latter alone can, in my view, be called a relief from forfeiture. By ordering a sale the Court gives the purchaser something vastly different from his rights under the agreement. Instead of preserving his right to pay the purchase-money and get a title,

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allows a new party to pay, not the purchase-money, but other purchase-oney, under a new agreement, and get a title, and it gives the original irchaser not his rights under the agreement, but the proceeds of the le. By ordering a sale the Court is not relieving against a forfeiture, is actually enforcing one. Once the property is sold under a decree the irchaser's right to get that property upon payment of money is forever one, and instead he may have a judgment against him enforceable by xecution if there happens to be a balance still due after the application the proceeds. This only makes it clearer that it is impossible in the ature of things to avoid a forfeiture in the long run if the purchaser will ot or cannot exercise his rights by payment. In my view it is no answer say that the Court gives him or preserves him his rights by giving him e benefit of the proceeds of the sale. The purchaser has, as I have said, pecuniary interest in the property to the extent of payments made. He as no pecuniary interest beyond that, he has simply a right to get the tle if he pays the balance. That is a different thing altogether, in my ew, from a pecuniary interest in the property over and above the mounts paid, and it is this non-existent pecuniary interest that the Court ves him when it hands over to him or to his benefit the proceeds of the le beyond what he has paid. * * * *

"We all know what is meant when we say that equity relieves against the enalty on a bond—it is simply that the Court will not allow the obligee enforce payment of the penal sum according to the letter of the bond, here there is only a smaller sum due, or ascertainable as damages * * * The forfeiture against which equity relieves for breach of condi-on in a lease is clearly the forfeiture of the term, it has no relation to oneys paid for rent; and so with mortgages. The absolute forfeiture *f the estate* at common law on breach of the condition was, in the eye of quity, an injustice and hardship;" [*Coote on Mortgages*, p. 11], and it was gainst this the Court relieved; the expression "forfeiture" was never pplied to moneys paid to the mortgagee whether on account of principal r interest.

The foregoing citations set forth the law and the procedure n reference to the subject-matter of this suit.

The case of *Campbell v. Holyland*, 7 Ch. D. 166, 47 L.J. Ch. 145, was cited to us on the argument as to the treatment of mortgagors and mortgagees as to the opening of foreclos-ures even after the order of foreclosure is absolute. In such a case it was held the mortgagor could redeem after the order for foreclosure was absolute and notwithstanding that after the order the mortgagee may have disposed of his interest to a purchaser, but whether or not he should be allowed to redeem lies in the discretion of the Court and depends on the circum-stances of each particular case and there is discussed the general nature of the circumstances under which foreclosure may be opened.

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I think that substantial justice would be done to all parties here by allowing the loan company to redeem and extending the time for payment into Court.

Since the argument our attention has been directed to a very recent case of *Davidson v. Sharpe* [1920] 1 W.W.R. 888. That was a case of the sale of land. The vendor sued on the agreement. The vendor took an order providing that on default of payment within a fixed period the purchaser should be foreclosed and the agreement cancelled. The question arose whether the vendor could sue in another province on the personal covenant. I do not think that the circumstances were such that they apply to the case before us.

There is no question about it that this Court has the power to grant the relief asked for by the defendants, the Central Canada Investment Corporation, Ltd.

A new day should be appointed for the payment of the moneys in question and I think in justice to all the parties these defendants should pay the costs of this appeal and the costs necessitated by their application for a new day.

DENNISTOUN, J.A.—On April 15, 1919, by a judgment of the Court of King's Bench, pronounced by the Chief Justice of that Court, the plaintiff was declared entitled to specific performance of an agreement for the sale of land set forth in the statement of claim.

The judgment went on to provide for a reference to the Master at Winnipeg to take accounts of the amount due to the plaintiff and that

> the Master do appoint a day three months after the making of his report for the payment by the defendants at such time and place as the Master shall direct of the amounts so found due.

The judgment further directed a reference as to subsequent encumbrancers and the taking of their accounts and the settlement of their priorities.

Then followed a direction that upon the defendants or any added party paying the amount so found due at such time and place the plaintiff should transfer and convey the lands to the said parties or to whom the Master should appoint.

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Lastly the judgment provided in the event of the defendants or encumbrancers (if any) making default in payment according to the report of the Master,

that the said agreement for sale be declared determined, rescinded, cancelled, foreclosed and at an end, and be delivered up to the plaintiff and that payments made thereunder be declared forfeited and that all improvements made upon the said lands be declared the property of the plaintiff and that the defendants deliver to the plaintiff immediate possession of the said lands and that the defendants and the said encumbrancers, if any, who have proved their claims stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said lands and that any caveats filed by the said defendants or any persons claiming through or under them be vacated and discharged, and that the plaintiff shall be entitled to an order on his application therefor, and doth order and decree the same accordingly.

This is a drastic judgment and if the defendants had seen fit to appeal it would in all likelihood have been reformed in accordance with the decisions of the Judicial Committee of the Privy Council in *Kilmer v. B. C. Orchard Lands, Ltd.* [1913] A.C. 319, 82 L.J.P.C. 77, 3 W.W.R. 1119; *Steedman v. Drinkle* [1916] 1 A.C. 275, 85 L.J.P.C. 79, 9 W.W.R. 1146, 33 W.L.R. 483; and *Brickles v. Snell,* [1916] 2 A.C. 599, 86 L.J.P.C. 22, [1917] 1 W.W.R. 1059; but no objection was taken to the form of the judgment and it cannot be questioned or reformed in these proceedings.

This judgment was taken into the Master's office and on July 8, 1919, he made a report finding due to the plaintiff the sum of $5,404.95 for principal, interest and costs payable on October 8, 1919, and directing same to be paid into a designated bank on or before that date.

Default in payment having been made an *ex parte* application was made to the Referee in Chambers on behalf of the plaintiff and on October 11, 1919, the Referee made an order declaring the agreement for sale referred to in the statement of claim cancelled, determined and at an end and the defendants foreclosed, and otherwise as set forth in the judgment of the Court above set forth.

On October 18, the plaintiff, believing the agreement to be determined and that he had a right to deal with the land, gave an option to purchase at $5,650, to one Mary Muys, who paid him the sum of $100 therefor. She was the wife of the orig-

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inal purchaser of the lands and had knowledge of the proceedings taken by the plaintiff to determine the agreement, the purchaser's rights under it having passed into the hands of the defendant the Central Canada Investment Corporation, Ltd.

On October 30, the solicitors for this company, who had been instructed to pay off the plaintiff in accordance with the Master's report, discovered that through error and oversight on their own part the day fixed by the Master had gone by and that meantime Mary Muys had acquired rights in the land under her option to purchase. They moved promptly and on November 25, 1919, the Referee in Chambers made an order joining Mary Muys as a party defendant in the action and providing that on payment into Court of $5,453.31 on or before December 2, 1919, his order of October 11 should be set aside, and the plaintiff stand redeemed.

The plaintiff did not appeal but Mary Muys did and her appeal was allowed by Galt, J. from whose order this appeal is taken.

Under similar circumstances had this been a mortgage contract there can be no doubt relief would have been given to the mortgagor and the time for redemption extended, notwithstanding the fact that a new purchaser had intervened, for there is authority for holding that a purchaser who contracts with a mortgagee in possession even after final order of foreclosure has notice that his vendor may be redeemed by order of a Court of equity and that the order for redemption will prevail over his agreement to purchase if the Court thinks fit to so direct: *Campbell v. Holyland,* 7 Ch. D. 166, 47 L.J. Ch. 145; *Johnston v. Johnston,* 19 P.R. 259; *Independent Order of Foresters v. Pegg,* 19 P.R. 254.

The contract in question is not a mortgage contract but one for the sale and purchase of land, and the rights of the parties are not the same. The Courts have in recent years consistently refused to regard a defaulting purchaser as entitled to the rights and remedies which have become associated with a defaulting mortgagor "that spoiled child of equity."

A purchaser who is in default, time being of the essence of the agreement, has no right to specific performance, and so

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oon as the contract has been determined, he has no further ght to the land and the Court has no jurisdiction to restore im to his former position: *Steedman v. Drinkle, supra; Davidson v. Sharpe* [1920] 1 W.W.R. 888.

The judgment of the Supreme Court of Canada in *David-on v. Sharpe* has very recently been delivered and was not re-erred to upon the argument of this appeal. It has an im-portant bearing upon the point under consideration.

At p. 896, Mr. Justice Anglin says as follows:

> By taking a foreclosure judgment the mortgagee does not take the roperty for his debt. The judgment notwithstanding its absolute form, construed as merely authorizing him to do so. The foreclosure judg-ent in the mortgage action is merely a means of enforcing the mortgage ntract, which it deals with as subsisting; whereas the judgment for res-ssion or cancellation of a contract between vendor and purchaser is a dgment not for the enforcement but for the extinguishment of the con-act. When the vendor sought and obtained a judgment fixing a period r payment and providing that on default "the agreement shall be can-lled and at an end and all monies paid thereunder forfeited to the aintiff," he elected in my opinion, on that event happening, to take the roperty in satisfaction of so much of the purchase-money as then re-ained unpaid.

In the present case the plaintiff Best sought specific per-ormance and in default of payment within a fixed time de-ermination of the contract; he asked for no personal relief gainst the defendant. He had no right under the judgment o issue execution. He made his election from among several emedies open to him as discussed by Lamont, J. in *Standard rusts Co. v. Little,* 8 Sask. L.R. 205, 8 W.W.R. 1112, '31 V.L.R. 769, approved by Anglin, J. in *Davidson v. Sharpe, upra,* at p. 896, and has taken the necessary steps to put an nd to the contract in the manner directed by the Court of ing's Bench.

The judgment provides that in the event of the said defend-nts or the encumbrancers making default in the payment ac-ording to the report of the Master the said agreement for sale be declared determined, rescinded, cancelled, foreclosed and t an end" and " that the plaintiff shall be entitled to an order n his application therefor *and doth order and decree the ame accordingly.*"

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This differs somewhat from the form of the judgment in *Davidson v. Sharpe, supra,* which was as follows:

> in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid by the time aforesaid that the defendant *thenceforth do stand absolutely debarred and foreclosed,* etc.

Of this Mr. Justice Anglin at p. 897 says:

> A judgment or order declaring that on the happening of a certain event an agreement for sale shall be cancelled and at an end means precisely what it says, and not merely that the plaintiff shall thereupon be entitled to have it cancelled and put an end to. When the purchaser under the order of the learned Chief Justice of British Columbia made default the agreement ceased to exist.

In my opinion the judgment of the Chief Justice of the King's Bench in this case terminated the rights of the defendants under the contract when they made default and no further or final order was necessary.

Provision was made by the judgment itself for the issue of a further order no doubt to enable the plaintiff to clear up his title in the land titles office, and as evidence that default in payment into the bank had been made.

This order was, in accordance with the usual practice, made by the Referee in Chambers, who acted upon the direction contained in the judgment that upon default "the plaintiff shall be entitled to an order on his application therefore, and doth order and decree the same accordingly."

Objection has been taken on this appeal to the jurisdiction of the Referee in Chambers to pronounce a foreclosure order in other than a mortgage action. Attention is directed to the words of the judgment quoted to show that the Referee did not presume to act upon his own authority. The contract had been terminated by the judgment and that judgment directed an order to issue when default occurred for the purpose of advertising the fact to all concerned. The Referee did nothing more than was authorized by the judgment. His order of October 8 did not affect the rights of the parties in any way and his order of November 25, setting aside his own order, could in no way restore the rights which had been settled by the judgment. It was properly set aside by the order of Mr.

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Justice Galt, now appealed from, and I agree with the reasoning of the learned Judge upon which his order was based.

This appeal should be dismissed with costs.

Appeal dismissed, Haggart, J.A. dissenting.

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COURT OF APPEAL

REX v. RITCHIE

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Intoxicating Liquors—Criminal Law — The Manitoba Temperance Act—Conviction for Prescribing Liquor "In Cases Where There Was no Actual Need" on Two Specified Dates—Evidence in Respect of Three Alleged Offences—One Penalty Imposed—Remission of Penalties Forbidden by Act—Conviction Bad—Amendment Impossible.

Accused was convicted under sec. 57 of *The Manitoba Temperance Act* that he "on the 28th and 29th days of November * * unlawfully did being a physician * * give prescriptions for intoxicating liquor in cases where there was no actual need" and was fined $50 and costs. The minimum penalty for a breach of said section is $50 and a magistrate is forbidden to remit, suspend or compromise any penalty under the Act. Three witnesses testified against accused, each with regard to a separate alleged offence, the evidence in any one instance not applying to any other, and each being denied by the accused.

Held, the conviction was bad and could not be amended.

Per Perdue, C.J.M. and Dennistoun, J.A.: The conviction would have to be for one of the alleged infringements of the Act and there was no means of ascertaining to which it was intended to apply; if the magistrate convicted for two or three infringements he was bound to impose the penalty for each.

Per Cameron and Dennistoun, JJ.A.: It was clear on the face of the conviction that the magistrate remitted the fine in one at least of the cases mentioned in the conviction, thereby doing what the Act forbids; therefore the conviction was invalid and not capable of amendment.

Per Fullerton, J.A.: Merely giving a prescription "in cases where there is no actual need" is not an offence under the Act, as to so hold would render meaningless the portion of the section which authorizes the physician to give a prescription in cases in which in his opinion the use of liquor is necessary.

ARGUED: 1st March, 1920.
DECIDED: 15th March, 1920.

MOTION to quash conviction under *The Manitoba Temperance Act* for that the accused "on the 28th and 29th days of

Statement.

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1920 November * * unlawfully did, being a physician * * give prescriptions for intoxicating liquor in cases where there was no actual need." Conviction quashed.

E. R. Chapman, for the accused.
John Allen, for the Crown.

PERDUE, C.J.M.—The accused, Dr. C. A. Ritchie, was charged, convicted and fined under sec. 57 of *The Manitoba Temperance Act,* 1916, ch. 112. The alleged offence is stated in the conviction as follows:

That he the said Dr. C. A. Ritchie on the 28th and 29th days of November, in the year of our Lord, one thousand nine hundred and nineteen at the City of Winnipeg, in the Province of Manitoba, unlawfully did being a physician, lawfully and regularly engaged in the practice of his profession give prescriptions for intoxicating liquor in cases where there was no actual need.

This conviction does not show any specific breach of the above section. It does not state the name of any person to whom a prescription was given. There must have been more than one offence, because two different dates are given — November 28 and 29. It appears to charge a course of conduct alleged to have been followed by the accused constituting a continuing breach of the Act on the days mentioned. Evidence was given by three witnesses who testified as to three separate and distinct offences alleged to have been committed by the accused within that period of time, but the evidence in any one of the instances named did not apply to any other of the three. Only one witness gave evidence for the prosecution in respect of each alleged contravention. From the manner in which the prosecution was conducted and the form in which the conviction is stated, I think it is clear that the magistrate did not intend to convict the accused of having given a prescription for liquor to any particular patient, but to convict him of having on the days mentioned followed the practice of giving to patients prescriptions for liquor when there was no actual need for it. The information described the offence or offences in the same manner as stated in the conviction. Sec. 77 allows several charges of contravention of the Act committed by the same person to be included in one and the same information, provided that the information must

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PERDUE, C.J.M.

ontain the time and place of each contravention; but it is vident that the magistrate convicted the accused of a single ffence, because he imposed only one fine. If he convicted or the three infringements he was bound to impose the penty for each: sec. 110. If the conviction is for a single ofence we have no means of ascertaining to which of the three ontraventions alleged in the evidence the conviction was inended to apply. This Court could not, therefore, amend. In ach case there was only the evidence of an informer as against e evidence of the accused, and each case had no connection ith either of the others. Clearly, the evidence in one case ould not be used in either of the others. It is urged on behalf the prosecution that there is an offence described in the ords of sec. 57 and that it is therefore sufficient under sec. 3. But a mere naming of an offence as "murder" or "theft" not enough. The charge must describe the offence with asonable certainty and contain a statement of facts by which is constituted so as to identify the accusation: *Rex v. Baindge*, 42 O.L.R. 203, 13 O.W.N. 218, 28 C.C.C. 444.

I think the magistrate tried the accused on a charge stated the loosely framed wording of sec. 57 and that he used the idence of the three informers as to separate and distinct ontraventions of the Act to support the charge that the acused did on the days mentioned "give prescriptions for inxicating liquor in cases where there was no actual need." or the reasons I have stated, I think this conviction is bad. cannot be amended so that a charge may be framed which ill be supported by the evidence.

The conviction should be quashed.

CAMERON, J.A.—This is a motion to quash a conviction nder *The Manitoba Temperance Act*, ch. 112, 6 Geo. V, on e grounds taken in the notice of motion for a writ of *certirari* on the return of which, by consent, the merits were argu-1. The defendant is a practising physician. The conviction ade by the magistrate, December 11, 1919, set forth that the efendant is convicted

r that he, the said Dr. C. A. Ritchie, on the 28th and 29th days of ovember, in the year of our Lord one thousand nine hundred and nine-

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Judgment.

CAMERON, J.A.

teen, at the City of Winnipeg, in the Province of Manitoba, unlawfully did being a physician lawfully and regularly engaged in the practice of his profession give prescriptions for intoxicating liquor in cases where there was no actual need contrary to the provisions of *The Manitoba Temperance Act*. A. R. Walkey being informant, and I adjudge that said Dr. C. A. Ritchie for his said offence forfeit and pay the sum of $50.00 dollars to be paid and applied according to law, and also that he pay to the said A. R. Walkey the sum of $9.50 Dollars for his costs in this behalf, and if the said several sums be not paid forthwith, then I adjudge the said Dr. C. A. Ritchie be imprisoned in the common jail for the Eastern Judicial District of Manitoba at Winnipeg and there be kept for the space of one month unless the said sums be sooner paid.

Three witnesses were called before the magistrate and gave evidence of three different alleged infractions of the Act by the defendant, one on November 28, and two on November 29.

Sec. 66 fixes the penalty for infraction of sec. 57. Under that section the person offending against sec. 57

shall be liable on summary conviction to a penalty for the first offence of not less than $50 nor more than $300, and in default of immediate payment to imprisonment for not less than two months nor more than four months, and for the second offence to a penalty of not less than $100 nor more than $500, and in default of immediate payment to imprisonment for a term of not less than four months nor more than eight months;

Sec. 110 of the Act provides that

No judge, magistrate, justice or inspector shall have any power or authority to remit, suspend or compromise any penalty or punishment inflicted under this Act; and every judge, magistrate and justice is hereby required to make a return of the case and pay over all fines and money immediately on receiving the same to the Provincial Treasurer.

There may be on the face of the conviction uncertainty whether one or both of the alleged infractions on November 29 are intended to be included in the terms of the conviction. One of them at least must be. In any event, whether one or both of the infractions of November 29 are to be included in the conviction it is plain that the magistrate has not complied with sec. 66, which requires the imposition of a penalty of not less than $50 for a first offence. I need not dwell for the present purposes on what may be considered a second offence. It is clear, therefore, on the face of the conviction that the magistrate has remitted the fine in one, at least, of the cases mentioned in the conviction and has thereby done what he is expressly forbidden by the Act to do.

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Judgment.

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In England there was formerly no objection to joining two offences in one conviction. *Paley on Convictions,* 282. But such has not been the case since 11 and 12 Vict., ch. 43, sec. 10. "Every such complaint shall be for one matter of complaint only and not for two or more matters of complaint."

Under the former law it was held that when, if both offences could have been included in one conviction, the defendant should be convicted of both. "A judgment for too little is as bad as a judgment for too much." *Rex v. Salomons,* 1 Term. Rep. 249, 1 R.R. 194, *Paley,* 291. See also *Paley* at 298: Discretionary power to mitigate penalties exists only in cases where it is vested by statute and in the Temperance Act such discretionary power is expressly denied.

A conviction must be good in all its parts, and differs in this respect from an order. The judgment in particular being an entire one, cannot be severed; and therefore, if it be bad as to part, the whole is thereby vacated, although the several parts may be in their nature distinct. *Paley,* 301.

It is to be noted that under sec. 100 no conviction is to be held invalid by reason of the punishment imposed being in excess of that which might have lawfully been imposed, provided it can be understood from such conviction that the same was made for an offence against some provision of the Act and provided that it can be understood from such conviction that the appropriate penalty or punishment for such offence was thereby adjudged. This is not a case where the punishment imposed is in excess of that which might have been lawfully imposed nor is it a case where the appropriate penalty has been adjudged. This is a case where the appropriate penalty for at least one offence has not been adjudged at all. There is only one offence for which a penalty is adjudged by the conviction while there are at least two offences for which the defendant was convicted and there are three offences in respect of which evidence was given.

This conviction is, therefore, invalid and not within the jurisdiction of the magistrate who signed it and does not come within secs. 100 and 101 so as to be capable of amendment.

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Judgment.

HAGGART, J.A.

This objection was not raised in the notice of motion, but it is apparent and must be dealt with. In my opinion the conviction must be quashed.

HAGGART, J.A., concurs in quashing the conviction.

FULLERTON, J.A.—The information charges that the applicant

on the 28th and 29th days of November, 1919, at Winnipeg, in the Province of Manitoba, unlawfully did, being a physician lawfully and regularly engaged in the practice of his profession, give prescriptions for intoxicating liquors, in cases where there was no actual need, contrary to the provisions of *The Manitoba Temperance Act.*

Counsel in support of the application contends that the information charges no offence in law.

Whether it does or not depends upon the construction to be placed on sec. 57 of the Act.

That section provides:

57. (1) Any physician who is lawfully and regularly engaged in the practice of his profession, and who shall deem any intoxicating liquors necessary for the health of his patients, may give such patient or patients a written or printed prescription therefor * * * but no such prescription shall be given or liquors administered, except in cases of actual need, and when in the judgment of such physician the use of liquor is necessary. And every physician who shall give such prescription * * * * in evasion or violation of this Act or who shall give to or write for any person a prescription for or including intoxicating liquor for the purpose of enabling or assisting any person to evade any of the provisions of this Act, or for the purpose of enabling or assisting any person to obtain liquor for use as a beverage, or to be sold or disposed of in any manner in violation of the provisions of this Act, shall be guilty of an offence under this Act.

Is it sufficient under this section to charge a physician with giving a prescription "in cases where there is no actual need"?

The physician is authorized to give prescriptions in cases in which he deems intoxicating liquor necessary for the health of his patient. The words "except in case of actual need and when in the judgment of such physician the use of liquor is necessary" in no way qualify or modify the earlier clause of the section. If the physician deem intoxicating liquor necessary for the health of his patient it must follow that there is "actual need" in his opinion.

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FULLERTON, J.A.

In *Rex v. Rankin*, 45 O.L.R. 96, 31 C.C.C. 275, Meredith, C.J.O., in dealing with the corresponding section of *The Ontario Temperance Act*, 6 Geo. V, ch. 50, struggles with the difficulty of giving a meaning to the words "actual need." At p. 281 he says:

> It is difficult to understand why the enactment was framed in the form in which it is drawn, and it seems strange that a physician should be authorized to prescribe liquor for a patient when in his judgment the use of liquor is necessary, and that at the same time he should be put in the position that, if there is in fact no need for prescribing liquor, he commits an offence against the Act. I have endeavoured to find some meaning for the words as to actual need which would not put a physician in that unfortunate position, and the only suggestion that has come to my mind is that the words were intended to apply to a case where the use of liquor was necessary for the patient, but he had no need of getting it because he had at the time in his possession all that he needed. The suggestion is not a very satisfactory one but, as I have said, it is the only one which has occurred to me. It may be that this is another instance of the ways of a Legislature being past finding out.

Ferguson, J.A., who dissented in this case, suggests the view that the words "no such prescription shall be given except in cases of actual need" were intended only as an expression of the definition the Legislature desired the physician to adopt as his guide or standard in arriving at his conclusion on the question submitted to him for decision, "Is intoxicating liquor necessary for the health of his patient?"

Whatever object the Legislature had in using the words "actual need," my view is that it could never have been intended that a physician who prescribes in the honest belief that intoxicating liquor is necessary for the health of his patient is guilty of an offence, because in fact the liquor was not necessary in the particular case, either by reason of the condition of the patient's health or because he was already amply supplied with liquor.

If this is so, then clearly, charging a physician with giving a prescription "in cases where there is no actual need" is not an offence under the Act.

To so hold would be to render meaningless the portion of the section which authorizes the physician to give a prescription in cases in which, in his opinion, the use of liquor is necessary.

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Judgment.

FULLERTON, J.A.

Test it in another way: The Crown on an information charging a physician with giving a prescription in a case where there was no actual need, satisfies the magistrate that there was no actual need of prescribing liquor in the particular case, if the information shows an offence in law, the physician must be found guilty and the fact that he honestly believed the liquor necessary would be no answer. I cannot believe the Legislature ever intended such a result.

In the *Rankin Case, supra,* no objection was taken to the sufficiency of the information, and the point was not considered by the Court.

On the argument counsel for the Crown referred to the case of *Rex v. Pazdrey,* decided by this Court on July 8, 1919, as being on all fours. I have looked up the papers in that case and find that the information charged Dr. Pazdrey with giving prescriptions to persons for liquor "for use as a beverage."

For the reasons which I have given, I think the information shows no offence in law and that the conviction must be quashed.

DENNISTOUN, J.A.—The information in this case does not comply with the provisions of sec. 77 of *The Manitoba Temperance Act,* 1916, ch. 112, in that several charges being included in one and the same information sufficient particulars of each contravention are not set forth.

The conviction is in the words of the information, that the accused

on the 28th and 29th days of November, 1919, at the City of Winnipeg, in the Province of Manitoba, unlawfully did, being a physician lawfully and regularly engaged in the practice of his profession, give prescriptions for intoxicating liquors in cases where there was no actual need contrary to the provisions of *The Manitoba Temperance Act.*

The accused is apparently found guilty of several offences which are not specified and one penalty of $50 and costs is imposed.

Evidence was given in respect to three prescriptions, one given on November 28, and two on November 29.

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Judgment.

DENNISTOUN, J.A.

I have endeavoured to deal with this case on the merits and to amend the conviction in accordance with the evidence, but am unable to do so. The magistrate apparently intended to convict for the prescription given on the 28th and for one or both of the prescriptions given on November 29. It cannot be determined which of them he had in mind, or which of the witnesses he believed.

Moreover, there being a conviction for more than one offence why was only one fine imposed and in respect to which offence was it imposed? It is impossible to tell.

In my opinion the conviction is bad for multiplicity and insufficiently describing the offences indicated, and cannot be upheld, even though the sweeping provisions of sec. 101 be invoked, nor can it be amended upon the evidence which has been taken for there is no means of knowing what portion of that evidence the magistrate believed, or what, if any, he rejected. The evidence of stool pigeons cannot prevail against that of a reputable physician in the absence of any indication of the credence given to it by the magistrate.

My brother Cameron has dealt in his reasons for judgment with another phase of the case with which I concur.

I refer to *Rex v. Leduc,* 43 O.L.R. 290, 30 C.C.C. 246; *Rex v. Bainbridge,* 42 O.L.R. 203, 30 C.C.C. 214, at p. 223; *Ex parte Simpson, R. v. Keeper of Halifax Jail,* 30 C.C.C. 334; *Rex ex rel Tiderington v. Rose,* 14 Alta. L.R. 118, [1918] 3 W.W.R. 950; *Rex v. Rankin,* 45 O.L.R. 96, 31 C.C.C. 275.

I would quash the conviction.

Conviction quashed.

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COURT OF APPEAL

DAVIES v. DANDY ET AL.

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Fraudulent Conveyances—Voluntary Conveyance—Solvency of Transferor —Whether Mortgagee a "Creditor" Within 13 Eliz., Ch. 5—Want of Title to Mortgage.

A mortgagee whose mortgage appears to be sufficient to realize his claim is not a "creditor" within the meaning of 13 Eliz., ch. 5.

The dismissal of an action brought by one claiming under a default judgment for moneys due under a mortgage, to set aside a voluntary conveyance made by defendant to his wife, was confirmed on above ground and because at the time the conveyance was made defendant had ample property with which to satisfy his obligations; also because (per Perdue, C.J.M. and Dennistoun, J.A.) plaintiff, through want of good title to the mortgage had not rightly been entitled to his judgment for the moneys.

ARGUED: 17th March, 1920.
DECIDED: 6th April, 1920.

Statement. APPEAL by plaintiff from the dismissal by Curran, J. of his action to set aside a voluntary conveyance from the defendant Dandy to his wife as being in fraud of creditors. Appeal dismissed with costs.

A. E. Hoskin, K.C. and *T. L. Hartley,* for plaintiff, appellant.

H. E. Henderson, K.C., for defendants, respondents.

PERDUE, C.J.M.—The plaintiff erected the apartment block in question in the year 1909, at a cost of some $21,000, all of which money he borrowed by mortgages on the property. He states that the land was worth about $6,500 and that the total value of the block and the land was about $28,000. In October, 1911, he sold the property to one Livingstone, the selling-price being nominally $50,000. The transaction was effected by Livingstone conveying to him a quantity of farm land and giving a mortgage on the block for $11,200, which mortgage was made to Davies' wife. In September, 1913, Livingstone sold the block to the defendant, Robert M. Dandy and one Poyner, for $63,000. The land is under *The Real Property Act* and the transfer to the purchasers was made subject to four mortgages upon which the aggregate amount due

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Judgment.

PERDUE, C.J.M.

was about $31,000. Dandy paid his share of the purchase-money to Livingstone by conveying to the latter a section of land, 640 acres, and paying $1,200 in cash.

On February 27, 1914, Dandy conveyed to his wife his home farm of 480 acres near Pierson, Manitoba, pursuant, as they both say, to a promise to do so made by him several years previously. The deed was registered in June, 1914.

At the time Dandy made the conveyance to his wife he had, in addition to his interest in the block personal property valued at $10,500. He appears to have had no other debts, except the mortgage on the farm.

During the year 1914, the rentals of the block amounted to $5,495.90, but Dandy believed at the time he purchased that the rentals were $6,300. In the following year the rentals fell to $4,474.16 and remained about the same until 1919, when they increased to $5,160. The net value of rentals for 1914 was $3,235.09 and in the years 1915-1916 about $2,189. At present it would appear that the block just about pays the various charges against it, including interest on the mortgages.

Under sec. 97 of *The Real Property Act*, R.S.M., 1913, ch. 171, there is an implied covenant in every instrument transferring an estate or interest in land subject to a mortgage, that the transferee shall pay the interest on the mortgage and shall indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument, and from and against all liability in respect of any of the covenants contained therein or implied under the Act. The plaintiff obtained from the executors of Livingstone an assignment of the debt due on the mortgage from Livingstone to the plaintiff, for which, as the document recites, Dandy and Poyner became liable under the implied covenant,

> and also the several covenants of Robert M. Dandy and S. J. Poyner for the due payment of said monies for the purpose of enabling said assignee to recover payment of said mortgage.

A suit was brought by the plaintiff against Dandy and Poyner on the debt and covenants so assigned. No statement of defence was delivered and judgment by default was en-

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PERDUE, C.J.M.

tered on December 31, 1918, for $9,784.55 and costs against both defendants. The plaintiff's position as a creditor entitled to impeach the conveyance from Dandy to his wife is founded upon this judgment. An exemplification of the judgment was put in at the trial. The plaintiff, in attempting to show that the debt or cause of action on which the judgment was recovered existed at the time of the conveyance from Dandy to Mrs. Dandy, went behind the judgment and put in the mortgage from Livingstone to Mrs. Davies and what purports to be an unregistered transfer of same from her to the plaintiff, dated August 29, 1913. The plaintiff also put in Ex. 9 which is a search letter from the land titles office showing the existing encumbrances on the land on which the block stands. This search letter shows that on October 23, 1912, Mrs. Davies transferred the whole of the mortgage made by Livingstone to her to the Northern Canadian Mortgage Company, who continued to be the owners of the mortgage at the time of the trial of this suit.

The transfer from Mrs. Davies to the plaintiff is in the form prescribed by *The Real Property Act* which does not require the names of mortgagor or mortgagee to be given but does require the mortgage to be identified by its registered number. The transfer given by Mrs. Davies to the plaintiff does not contain the name of the mortgagor and gives the registered number of the mortgage transferred as 327919. The registered number of the mortgage from Livingstone to her is 227919. The transfer, therefore, is not sufficient and could not be registered under sec. 109 of the Act. As the transfer does not refer to any existing mortgage on the land it does not confer upon the plaintiff even a right to the registration of it under sec. 98. The mortgage is under seal and the transfer is an unsealed instrument which has not validity apart from the statute. An actual consideration from the plaintiff to Mrs. Davies was not proved. There was not shown, therefore, even an equitable assignment of the mortgage or of an interest in it to the plaintiff such as would enable him to recover upon it.

By sec. 97 of *The Real Property Act* there was an implied covenant to Livingstone by Dandy and Poyner that they would

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PERDUE, C.J.M.

pay the interest on the mortgage as it fell due, and that they would indemnify him against the principal sum. An assignment of this covenant to the owner of the mortgage would enable the owner to sue Dandy and Poyner for the principal and interest and compel them as the debtors to make payment to him: *Irving v. Boyd,* 15 Gr. 157; *British Canadian Loan Co. v. Tear,* 23 O.R. 664.

But in the action brought by the plaintiff against Dandy and Poyner we find a person who is not the owner of the mortgage or entitled to sue upon it recovering judgment for the whole mortgage moneys and interest by virtue of an assignment from Livingstone, the mortgagor, of the statutory covenant of indemnity against the mortgage. Meanwhile the mortgage itself is outstanding in the Northern Canadian Mortgage Company, who are the legal holders of it and entitled to sue upon it. No doubt the judgment is binding against Dandy until it is opened up. It clearly appears that, apart from this default judgment obtained on a spurious cause of action, Davies is not and never was a creditor of Dandy. Dandy's creditors whose claims were in existence when he made the conveyance to his wife have taken no steps to attack it. So far as we have knowledge of them, they have either been paid or they are secured by mortgages on the apartment block in question. At the time the conveyance was made the apartment block was worth $40,000 according to the evidence of Mr. Hamilton, an expert valuator. The encumbrances were then about $31,000. The net revenue was sufficient, during 1914, to pay interest on all the mortgages at the rate of eight per cent per annum. At the present time the revenue from the block is about the same as it was in 1914. Mr. Hamilton estimates its present valuation to be $40,000.

I think the trial Judge was justified in finding that Dandy had at the time he made the conveyance to his wife sufficient property to satisfy the obligations for which he was then liable. The circumstances in this case are very like those in *Crombie v. Young,* 26 O.R. 194. There the defendant shortly after making a mortgage made a voluntary settlement of other property on his wife. The value of the mortgaged property was

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PERDUE, C.J.M.

at the time greatly in excess of the amount of the loan and was deemed by the parties to be ample security. No intention to defraud was shown, but owing to a stagnation in real estate when the mortgage matured the property could not be sold for the amount due upon it. It was held by the Divisional Court that a mortgage debt was not within the statute, 13 Eliz., c. 5, unless it is shown that the mortgage security at the time of the loan was of less value than the amount loaned. The mortgage upon which the plaintiff in the present case bases his claim to be a creditor of Dandy was given by Livingstone to Mrs. Davies to secure a balance of purchase-money of the block in question, the purchase-price being $50,000, and there being only $25,000 of mortgages having priority over it. The Davies are hardly in a position to say that the security was not at the time worth the amount of the mortgage.

The appeal should be dismissed with costs.

CAMERON, J.A.—In this case Mr. Justice Curran dismissed the action at the trial, making findings of fact which, in my opinion, are amply supported by the evidence. I am convinced there was no intention on the part of the defendants to defeat or delay creditors within *The Statute of Elizabeth.*

The question of intent to delay, hinder, or defraud creditors is always one of fact, which the court has to decide on the merits of each particular case after taking all the circumstances surrounding the making of the alienation into account [15 *Halsbury,* p. 83.]

Even if it had been shown that the necessary effect of the conveyance in question was to defeat and delay the husband's creditors (and in my opinion that was not established) that circumstance would not be conclusive of the intent to defraud. 15 *Halsbury,* p. 85. In *Ex parte Mercer, In re Wise,* 17 Q.B.D. 290, at p. 299, 55 L.J.Q.B. 558, Lord Esher referring to

the assumption that, if the natural or necessary effect of what the settlor did was to defeat or delay his creditors, the Court must find that he actually had that intent,

says: "That proposition or doctrine I entirely abjure."

All the circumstances referred to in the argument as constituting badges of fraud are readily susceptible of explanation. Neither the war nor its consequences were in contempl

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CAMERON, J.A.

on at the time of the transaction. The husband had every onfidence in the value of his purchase of the Gwalia Block he showed by his large investment of land and money in it.

I further think the objection that the plaintiff is not a cred-or within the statute, 13 Eliz., ch. 5, is well taken.

Mortgagees, therefore, who have a specific portion of property set aside, d so far as their interest is concerned, freed from liability to the gen-al debts, and to which they can, primarily at least, resort for the satis-ction of their claims, are not to be regarded as "creditors," or, at least, mortgage debt is not, properly speaking, a debt for the purposes of the atute * * * *. But if the property mortgaged is not sufficient to isfy the debt, the mortgagee, of course, will be a creditor of the balance *lay's Fraudulent Conveyances*, p. 104.]

ee also *Crombie v. Young*, 26 O.R. 194; *Sun Life Assur Co. Elliott*, 31 S.C.R. 91 (referred to in note in *May, ibid*). The termination of this is a question of fact and the trial Judge s made a finding which is supported by the evidence. In ct the only competent evidence on which stress can be laid garding the value of the Gwalia Block is that of Mr. Hamil-n, who testified that there was ample security in the pro-rty for all the encumbrances against it.

The plaintiff's claim is on a judgment and arose out of a ortgage given by one W. G. Livingstone to his (the plain-ff's) wife on the Gwalia Block for $11,200, dated October 1911, payable $2,000 on September 1, 1912, 1913, and the lance September 1, 1915, with interest at six per cent. This ortgage the plaintiff's wife assigned to the Northern Can-ian Mortgage Company as security for a loan of $2,000. August, 1913, Livingstone sold and transferred to James andy and one Poyner the said block. August 29, 1913, the aintiff's wife assigned to him the said mortgage subject to the nount due to the Northern Canadian Mortgage Company. vingstone died April 2, 1917, and his will was duly proved October, 1917, by his executors, who, June 5, 1918, trans-rred and assigned the "debt" due the Livingstone estate by andy and Poyner to the plaintiff.

There was, therefore, no privity of contract at any time etween the plaintiff's wife or the plaintiff and Dandy or oyner, the purchasers from Livingstone. The liability of

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CAMERON, J.A.

Dandy and Poyner arose solely by operation of sec. 97 *The Real Property Act*, R.S.M., 1913, ch. 171, under wh there is implied a covenant by the transferee to the transfe to indemnify and keep harmless the transferor against principal sum or other moneys secured by any mortgage which the land is subject. It was only on the assignment Livingstone's executors to the plaintiff in June, 1918, t the plaintiff acquired a right of action against Dandy. Th circumstances tend to give added stress in this case to the g eral rule that a mortgage debt is not, properly speaking, a d for the purposes of the statute. For in applying the rul appears that while the plaintiff is a mortgagee of the premi it is not the defendant Dandy that is his mortgagor. Dar became liable to Livingstone by virtue only of the statut covenant implied in the transfer from Livingstone to him to the plaintiff by virtue solely of the assignment nearly years later by the executors of Livingstone to the plaintiff the "debt" on that implied statutory covenant.

I would dismiss the appeal.

HAGGART and FULLERTON, JJ.A., concurred in dismiss the appeal.

DENNISTOUN, J.A.—This is an action by a judgment cre or to set aside a voluntary conveyance made by the defend Dandy to his wife the co-defendant.

The learned trial Judge has found that the plaintiff is a creditor within the meaning of 13 Eliz., ch. 5, and that the time the voluntary conveyance was made to his wife defendant Dandy had ample property with which to sati the obligations for which he was liable. He therefore missed the plaintiff's action. I am of the opinion that he right in so doing.

At the time the voluntary conveyance was made on Feb ary 27, 1914, Dandy owned chattel property which he valu at $10,500, and which he sold in 1917, for over $8,000. also owned an interest in an apartment block in Winnip which he had purchased in 1913, in partnership with one P ner for $63,000, subject to mortgages amounting $31,883.93. In settlement of that purchase he had paid

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Judgment.

DENNISTOUN, J.A.

ands and cash the sum of $20,080. The rentals of this block mounted to some $5,500 per annum gross and to about 3,200 net. He had at that time no debts except those assumd by implied covenant in respect to the mortgages on the lock.

The apartment block purchased by the defendant and the arm lands given by him in exchange were no doubt valued at high price at the time the deal was completed, but in any vent the value of the block was to a very considerable amount n excess of the encumbrances against it.

The trial Judge was clearly right in finding that Dandy vas not in insolvent circumstances, or unable to pay his debts n full, or on the eve of insolvency when he conveyed his omestead farm to his wife in 1914, pursuant to a promise vhich he had made to her in 1909, and had repeated more than nce. It follows that the voluntary conveyance cannot be successfully attacked under *The Assignments Act*, R.S.M., ch. 2, sec. 38.

It then remains to be considered whether it can be declared raudulent under 13 Eliz., ch. 5.

That statute provides in effect, that all conveyances and dispositions of property real or personal, made with the intention f delaying, hindering, or defrauding creditors, shall be null nd void as against them, their heirs and assigns.

In considering whether a voluntary conveyance is void under the statute the *intent or purpose* of the donor only in aking the gift is to be regarded. The cases in which such onveyances are void as against creditors whose claims exist t the time of the conveyance may be divided into: (1) Those n which the fraudulent intent, though not apparent as a fact n evidence in the case, is established as a presumption of law; nd (2) Those in which such intent appears as a fact in evience.

As to the first class of cases it may be stated generally that ny voluntary transfer of property by a person "indebted" acording to Lord Hardwicke's meaning in *Townshend (Lord) . Windham*, 2 Ves. (Sen.) 1, at p. 10, is void as against his xisting creditors.

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Judgment.

DENNISTOUN, J.A.

The mere fact of a man thus indebted giving away part of his estate is by presumption and construction of law a fraudulent act.

The principle on which the statute of 13 Eliz. c. 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made. [*Freeman v. Pope*, L.R. 5 Ch. 538, at p. 540, 39 L.J. Ch. 689.]

But there is a qualification of this doctrine which must be here considered. The statute of 13 Eliz., ch. 5, is clearly intended to prevent persons from conveying away the whole or any part of their property in derogation of the rights of those who as *general* creditors have a claim on the *general* assets of their debtor. Mortgagees, therefore, who have a specific portion of property set aside and so far as their interest is concerned freed from liability to the general debts, and to which they can primarily at least resort for the satisfaction of their claims are not to be regarded as "creditors"; or at least a mortgage debt is not, properly speaking, a debt for the purposes of the statute; for a fully secured debt is generally excluded from an estimate of liabilities.

At the time the debt which formed the cause of action now merged in the judgment sued on was incurred, it was secured by mortgage on the apartment building referred to. True it was a fourth mortgage for $7,200 with some $24,000 in priority to it, but the property upon which it was charged had been sold for $63,000 in 1913, and was valued by a competent valuator at $40,000 at the time of the trial. There is no evidence that any attempt has been made to realize upon the security of the land and I am unable to say upon the evidence that such security is insufficient to satisfy the plaintiff's judgment without calling upon the defendant under the implied covenant for indemnity to his immediate transferor which has been assigned to the plaintiff. That being so, it is impossible to hold that a fraudulent intent to delay or defeat the claims of this plaintiff has been established as a presumption of law, for although the debt is one which has been in existence since a time prior to the voluntary conveyance, the plaintiff has never been a creditor looking to the general assets of the defendant within the meaning of 13 Eliz. *Freeman v. Pope, supra; Sun Life*

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DENNISTOUN, J.A.

Assur. Co. v. Elliott, 31 S.C.R. 91, at p. 95; *Ex. parte Mercer, In re Wise,* 17 Q.B.D. 290, 55 L.J.Q.B. 558; *May's Fraudulenlent Conveyances,* 104; *Crombie v. Young,* 26 O.R. 194.

I do not consider it necessary to discuss the evidence as to intent which may by inference be drawn from the conduct of the parties as was skilfully done by Mr. Hoskin in his able argument. Had this debt been unsecured, and the plaintiff's right to sue free from doubt, I would have approached this ground of appeal with a strong inclination in the appellant's favour.

Although this action is brought upon a judgment obtained on December 31, 1918, the plaintiff did not rely upon his judgment alone, but opened up the whole of the transactions back as far as the year 1913. He no doubt felt compelled to do this in order to show the continuity of the debt back to and antecedent to the voluntary conveyance.

Having taken this course, the whole question of his right to recover that judgment appears to be at large. An examination of his documents of title shows that he had no right to obtain the judgment which the defendant allowed to go by default, owing to his absence in California, and his ill-health. The title to the mortgage sued on is not in the plaintiff, but appears to be in the Northern Canadian Mortgage Company, which was not a party to the action, and upon this ground alone the plaintiff should not recover.

There remains yet another which was but lightly touched upon during the argument, and that is with regard to the exemption of a homestead from proceedings of this kind. The lands conveyed by the defendant to his wife consisted of his homestead and other land.

If *Fredericks v. Northwest Thresher Co.,* 3 Sask. L.R. 280, 15 W.L.R. 66, 44 S.C.R. 318, and *Hart v. Rye,* 5 W.W.R. 1280, 27 W.L.R. 9, apply, he had a right to alienate his homestead as he saw fit without regard to the claims of creditors. On the other hand, if *Roberts v. Hartley,* 14 Man. R. 284, be still the law of Manitoba, he had not. The decision will depend upon the construction to be placed upon the statutes

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which govern in each province when read by the light of th decision in the Supreme Court of Canada.

Upon the whole case so many difficulties beset the plaintif that I am of opinion the findings of the learned trial Judg should not be disturbed, and I would dismiss the appeal wit costs.

Appeal dismissed with cost

COURT OF APPEAL

REX EX REL. HAMMOND v. CAPPAN

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOU JJ.A.

Criminal Law—Inland Revenue Act, S. 180 (e)—Having in "Possessio a Still—Still on Accused's Premises without His Knowledge.

A person is not guilty of having in his possession a still under sec. 180 (of *The Inland Revenue Act* if, though the still be on his premises, has no knowledge of its existence (*Per Curiam;* Cameron, J.A. d senting).

ARGUED: 4th March, 1920.
DECIDED: 6th April, 1920.

Statement.

Case stated by R. M. Noble, Esq., police magistrate for t province of Manitoba, under sec. 761 of *The Criminal Code*

H. P. Blackwood, K.C. and *C. A. I. Fripp,* for Crown.
M. G. Macneil, for accused.

PERDUE, C.J.M.—This is a case stated by R. M. Nob Esq., a police magistrate for the province of Manitoba, und the provisions of sec. 761 of *The Criminal Code.*

The accused was prosecuted under sec. 180, subsec. (*e*) *The Inland Revenue Act,* R.S.C., 1906, ch. 51. That ena ment declares that:

Every person who without having a license under this Act, then force,—

* * * * * * *

(*e*) has in his possession, in any place, any such still, worm, rectifyi or other apparatus, or any part or parts thereof, or any beer or wa suitable for the manufacture of spirits, without having given notice there as required by this Act, except in cases of duly registered chemical sti of capacity not exceeding three gallons each as hereinbefore provided f or in whose place or upon whose premises such things are found; * * is guilty of an indictable offence, and shall, &c.

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Then follows the punishment prescribed.

The charge is that the accused had in his possession a still uitable for the manufacture of spirits without first having obained a license required by the Act, and without having given ne notice thereof required by the Act.

It is incumbent upon the prosecutor to establish that the accused was in possession of the still. The still was found covred with a sack in a shed on the premises of the accused, not ar from his house. The accused denied all knowledge of the ill and also denied that he had ever manufactured liquor. he magistrate believed the accused and held that there must e knowledge by the accused of the existence of the still upon s property in order to constitute the offence as charged.

It is contended by counsel for the prosecutor that, under the ove section of the statute, possession of the still created an rebuttable presumption of the guilt of the accused and that *mens rea* need not be shown. It is therefore of the greatest nportance to ascertain what constitutes "possession" within ne meaning of the Act.

"Possession" is dealt with in *Stephen's Digest of the Crimal Law*, 6th ed., p. 243, art. 306. The author says:

> A movable thing is said to be in the possession of a person when he is situated with respect to it that he has the power to deal with it as owner the exclusion of all other persons, and when the circumstances are ch that he may be presumed to intend to do so in case of need.

Now if, as is the finding of the magistrate in the present se, the accused had no knowledge of the existence of the ill, he never could have assumed any mental attitude in reard to it. He never owned, received or accepted it. He ever authorized any other person or persons to do anything regard to it. He is in the position of an innocent man into hose pocket a thief has thrust a stolen article in order to void detection. I cannot believe that the statute intended to flict heavy penalties upon persons who were not guilty of ny act of omission or commission.

Counsel for the prosecutor cited *Rex v. Brennan*, 35 N.S.R. 06. That was a case where the accused had been convicted, nder the Act, of unlawfully having a still in his possession.

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The objection taken on the motion before the Court was that no specific place where he had the possssion of the still was mentioned in the conviction. The decision does not afford us any assistance in the present case. *Rex v. Kennedy* in the same volume of reports, at p. 266, was similar to the *Brennan Case.*

Reg. v. Woodrow, 15 M. & W. 404, 16 L.J.M.C. 122, was much relied upon by the prosecution. There a dealer had purchased tobacco as genuine and had it in his possession. The tobacco had been adulterated. It was held that the dealer was liable under *The Excise Regulation Act* for having in his possession the adulterated tobacco. Pollock, C.B., in giving his judgment, said, at p. 415 (15 M. & W.):

> It appears to me, that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco, (indeed, a man can hardly be said to be in possession of anything without knowing it), it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality.

Alderson, B. said, at p. 418 (15 M. & W.):

> He did not know that it was in an adulterated state, but he knew he had it in his possession; and the question of "knowingly," it appears to me, is involved in the word possession. That is, *a man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge.* It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned.

In 1917, a case involving the meaning of the word "possession" as used in sec. 356 of *The Inland Revenue Act* was decided by the Court of Appeal for British Columbia. That case is *Rex ex rel. Robinson v. Young,* 24 B.C.R. 482 (reported more fully in [1917] 3 W.W.R. 1066). The charge was that the accused had in his possession manufactured tobacco not put up in packages and stamped in accordance with the Act, he not being a licensed tobacco manufacturer. The accused and two other Chinamen were found together in a room with a quantity of tobacco which was not in packages and stamped in accordance with the Act. They were engaged in handling the tobacco, cutting, weighing and putting it in packages. It appeared that the tobacco belonged to another Chinaman who

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was tenant of the premises and who employed one of the men found on the premises to cut the tobacco and put it in packages and permitted the men to occupy the premises. The police magistrate dismissed the charge on the ground that the accused was not "in possession" of tobacco contrary to sec. 356 of the Act. On a stated case the Court of Appeal unanimously upheld the decision.

Sec. 356 of the Act does not contain the word "knowingly" and is equally as positive in its enacting words as sec. 180.

Many cases were cited by counsel for the prosecution to establish that *scienter* or *mens rea* need not be shown in order to render the accused liable under a positive statutory prohibition; but I cannot find any one of them which goes so far as to hold that, where it is established as a fact, as it is in the present case, that the accused had no knowledge, either personally or through another acting for him, of the existence of the incriminating article, he was held to be in guilty possession of it.

The words in the last two lines of subsec. (*e*) of sec. 180, "or in whose place or upon whose premises such things are found" are, I think, intended to constitute an offence separate and distinct from that contained in the earlier part of the subsection. The words quoted cannot be taken as merely explanatory of what goes before. They should be read with what precedes and what follows them in this connection:

> Every person in whose place or upon whose premises such things [that is any still, worm, &c.] are found is guilty of an indictable offence and shall, for the first offence, be liable, &c.

This is a different matter from having such things in his possession. They may be in his place or on his premises although in the possession of another person. But in a case where the incriminating things have merely been found in the place or upon the premises of the accused and he denies all knowledge of them, and the magistrate believes him, the magistrate would not be justified in convicting him.

I would answer the question by the magistrate—"Was I right in so holding?" in the affirmative.

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CAMERON, J.A. (dissenting)—This is a case stated by police magistrate R. M. Noble under the provisions of *The Criminal Code*. The information was laid January 15, 1920, against the accused for that he

did unlawfully have in his possession a still suitable for the manufacture of spirits without first having obtained the license required by *The Inland Revenue Act* and without having given the notice thereof required by the Act.

The magistrate found the following facts:

It was shown before me that,—

1. The officers at Winnipeg of the Department of Inland Revenue found on the premises of the accused, Gustave Cappan, in the Rural Municipality of Fort Garry, in the Province of Manitoba, on the 13th day of January, 1920, a portion of a still consisting of a condenser and worm suitable for the manufacture of spirits.

2. The accused was prosecuted under the provisions of *The Inland Revenue Act*, Revised Statutes of Canada (1906) cap. 51, section 180, sub-section "E."

3. The accused had no license under *The Inland Revenue Act* and had not given the notice required by the Act.

4. The still was found covered with a sack in a shed situated upon the premises of the accused, not far from the house of the accused.

5. Close to the box was found a receptacle of cylindrical shape about two feet long and one foot in diameter, somewhat similar to an oil drum with one end removed, containing the remains of some coal and charcoal which could be used as a heater for the purpose of heating the contents of a boiler which was not found, but which would (if found?) contain the ingredients for the manufacture of spirits, and be placed between the heater and still.

6. This receptacle could also be used for the purpose of heating food for cattle.

7. The still smelt somewhat strongly of spirits and showed signs of recent use.

8. The windows of the shed were broken and the door unlocked. The shed was used as a storage place for a reserve supply of coal and wood belonging to the accused, was situated on the property of the accused, and was under his sole control.

9. The accused denied all knowledge of the still and also denied that he ever manufactured liquor, and I believed him.

His conclusion is as follows:

I hold that the mere finding of a still or portion of a still upon the property of the accused was not sufficient under the section and sub-section of *The Inland Revenue Act* referred to, to justify me in convicting the accused unless it is shown that the accused had knowledge of its exist-

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nce on his property, in other words, that possession without knowledge not an offence under the section.

And the question submitted to this Court is—"Was I right n so holding?"

The Inland Revenue Act, ch. 51, sec. 180, provides: [See *nte,* p. 316.]

The question is whether a *mens rea* is a necessary ingredint of the offence under this subsection.

In *Craies' Statute Law,* commencing at p. 433, there is a iscussion of the subject here involved. Amongst the leading ases there referred to are *Reg. v. Tolson,* 23 Q.B.D. 168, 58 .J.M.C. 97; *Bank of N.S.W. v. Piper* [1897] A.C. 383, 66 .J.P.C. 73; *Coppen v. Moore* (No. 2) [1898] 2 Q.B. 306, 7 L.J.Q.B. 689. The author points out at p. 437, that the ifficulty arises

deciding whether the statute prohibits absolutely the acts defined as onstituting an offence, or whether the prohibition is to be read with the ommon law qualification [i.e., with the qualification that there must be oved a guilty knowledge on the part of the accused]. The application ust in every case turn on the wording of the particular enactment, or, in ase of ambiguity, upon the governing intention of the Act in which it is ontained.

Frequently the Legislature designates the mental element of he offence by the use of such words as "wilfully" or "knowngly" but not always or, indeed, generally, so as Brett, J. said n *Reg. v. Prince,* L.R. 2 C.C. 154, at p. 163, 44 L.J.M.C. 122,

There are enactments, which by their form seem to constitute the prohibited acts into crimes, and yet by virtue of which enactments the defendants charged with the committal of the prohibited acts have been convicted in the absence of the knowledge or intention supposed necessary o constitute a *mens rea.* Such are the cases of trespass in pursuit of ame, or of piracy of literary or dramatic works, or of the statutes passed o protect the revenue.

And it is pointed out that to these may be added enactments elating to the sale of intoxicating liquors (*Sherras v. De Rutzen* [1895] 1 Q.B. 918, 64 L.J.M.C. 218; *Emary v. Nolloth* 1903] 2 K.B. 269, 72 L.J.K.B. 620) food, (*Dyke v. Gower* 1892] 1 Q.B. 220, 61 L.J.M.C. 70), and drugs (*Fitzpatrick . Kelly,* L.R. 8 Q.B. 337, 42 L.J.M.C. 132), fertilizers and eeding stuffs (*Laird v. Dobell* [1906] 1 K.B. 131, 75 L.J.

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K.B. 163; *Korten v. West Sussex County Council*, 72 L.J.K.B. 514, 88 L.T. 466), and to weights and measures (*Great Western Ry. v. Bailie*, 5 B. & S. 928, 34 L.J.M.C. 31) *Craies' Statute Law*, p. 438.

Mr. Stroud in his work on *Mens Rea* treats of the subject at pp. 29 *et seq.* His view is in favour of upholding the general doctrine that, in all cases the normal rule prevails, except under such statutes as exclude the rule by express or implied provision to the contrary. In the comparatively few cases where convictions have been upheld in spite of essential ignorance

> the offences have been of such a character as to involve great public danger or inconvenience, and the main object of the criminal or quasi-criminal proceedings usually is to effect the summary abatement or prevention thereof; *i.e.*, to secure the stopping of the actual mischief complained of rather than to inflict retributive punishment or to deter offenders in general.

The author discusses the decision in *Reg. v. Prince, supra* and *Reg. v. Tolson, supra*, the latter of which he says is easier to understand.

Those two cases he refers to as dealing with crimes. Other cases dealing with offences which he designates quasi-crimes are discussed by him at pp. 39 *et seq.* He considers these classes of so-called crimes as requiring no culpable intentionality whatever to constitute criminal liability in respect of them. Some of the cases cited by him have already been mentioned. There are others that are instructive, such as *Betts v. Armstead*, 20 Q.B.D. 771, 57 L.J.M.C. 100; *Pain v. Boughtwood*, 24 Q.B.D. 353, 59 L.J.M.C. 45; *Blaker v. Tillstone* [1894] 1 Q.B. 345, 63 L.J.M.C. 72, (diseased meat) (where it was held

> We are dealing with a statute passed for the protection of the public the purpose of which would be defeated if it were necessary to show guilty knowledge in the seller);

Firth v. McPhail [1905] 2 K.B. 300, 74 L.J.K.B. 458 (where Lord Alverstone expressly approved the decision in *Blaker v. Tillstone, supra*); *Atty.-Gen. v. Lockwood*, 9 M. & W. 378, 6 Jur. 171; *Reg. v. Woodrow*, 15 M. & W. 404, 16 L.J.M.C. 122; *Cundy v. LeCocq*, 13 Q.B.D. 207, 53 L.J.M.C.

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125. In *Reg. v. Bishop,* 5 Q.B.D. 259, 49 L.J.M.C. 45, the defendant was indicted for receiving more than two lunatics into an unlicensed house, and Lord Denman observed that if the defendant's honest belief was held to be a defence, the object of the statute might be frustrated. Stephen, J. said that the stringent construction put on the Act there in question was warranted by its general scope and the nature of the evils to be avoided. In *Reg. v. Woodrow, supra,* (cited in other cases on this point in *Crankshaw's Criminal Code,* p. 25) a dealer in tobacco was held liable for having in his possession adulterated tobacco, though he had purchased it as genuine and had no knowledge or cause to suspect that it was not so. Parke, B. said, at p. 417 (15 M. & W.):

> An innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so. The legislature have made a stringent provision for the purpose of protecting the revenue, and have used very plain words.

Mallinson v. Carr [1891] 1 Q.B. 48, 60 L.J.M.C. 34, dealt with *The Public Health Act, 1875,* by which power is given to a health officer to inspect meat and if it appears unsound he may seize it, whereupon a justice may condemn the meat

> and the person * * * in whose possession, or on whose premises the same was found shall be liable to a penalty.

The judgment of the Court was that a person having in possession unsound meat was liable to be convicted notwithstanding that he had not exposed the meat for sale. Lord Brampton in his judgment says:

> It was urged in the argument * * * that the legislature could not have intended that a person who was ignorant of the condition of unsound meat found on his premises should be liable to conviction.

He declined to decide the question, but pointed out the absence of the words "knowingly" and "wilfully" from the statute in question.

In *Cork v. Walsh* [1908] 2 Ir. R. 234, Lord O'Brien refers to that part of Lord Brampton's judgment just mentioned and goes on to say:

> He [Lord Brampton] gives no decided opinion as to whether the Legislature intended that a person who was ignorant of the condition of un-

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sound meat, found on his premises, should be liable to a conviction. For my part I have no doubt about it, and I take the view expressed by Mr. Justice Stephen [p. 240].

He then quotes at length from the judgment of that great jurist from which I take the following:

"It was argued that this construction would render liable to conviction persons who were ignorant of the fact that the meat found in their possession was unfit for human food, and it was said to be an unreasonable intention to impute to the Legislature. I do not think that is the proper way to interpret an Act of Parliament. The true rule is to take the words used in their ordinary and natural sense, and to construe them accordingly, without reference to any supposed intention of the Legislature which cannot be gathered from the natural and ordinary meaning of the words."

Parker v. Alder [1899] 1 Q.B. 20, 68 L.J.Q.B. 7, 19 Cox C.C. 191, was a case under *The Sale of Food and Drugs Act, 1875,* where the respondent Alder shipped milk under contract to the Metropolitan Milk Supply Association to be delivered at Paddington Station. He delivered his supply of milk in sealed churns at Challow for transmission by the Great Western Railway to Paddington and did not, and could not, exercise control after delivery. The milk handed over at Challow was pure and the water was thereafter added in transit to Paddington by a stranger without the knowledge or default of the respondent. The magistrate dismissed the charge and stated a case in which his findings of fact are set out. From this the appellant, an inspector who was the complainant, appealed. The appeal was allowed by Lord Russell, C.J. and Wills, J.

In a late case of *Andrews v. Luckin,* 87 L.J.K.B. 507, 26 Cox C.C. 124, involving similar facts, Darling, Avory and Sankey, JJ. followed the decision in *Parker v. Alder, supra.* Mr. Justice Darling quotes with approval the statement of Lord Russell in his judgment where he said:

Now, assuming that the respondent was entirely innocent morally, and had no means of protecting himself from the adulteration of this milk in the course of transit, has he committed an offence against the Acts? I think he has. When the scope and objects of these Acts are considered, it will appear that if he were to be relieved from responsibility a wide door would be opened for evading the beneficial provisions of this legislation.

We are, therefore, to look at the whole scope of *The Inland Revenue Act,* the object of its stringent provisions, the nature

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the mischief they were intended to prevent, the wording of e Act as a whole and especially that of the particular provis- n in question. The section and subsection are plain, positive d direct.

Every person who without having a license * * * has in his posses- on * * * any such still * * * or upon whose premises such things e found * * * * is guilty of an indictable offence.

Neither the word "knowingly" nor any other similar word found in it. In some of the sections, knowledge is neces- y to constitute the offence, such as secs. 192 and 243. But others it is not.

But apart from the wording of sec. 180, the whole scope d object of the Act point to the conclusion that unless the ntext otherwise requires or a contrary intention is to be fair- inferred the object of Parliament was to make the viola- ons of the Act indictable offences without regard to the owledge of the offender. I take it the Act is primarily in- nded as a revenue measure and that its drastic provisions are acted for the purpose of protecting the revenues of the rown. It can also be said that it is intended to protect the ublic in other respects apart from the question of revenue. he object of the section in question, therefore, might be ren- ered nugatory if it were necessary to show a guilty knowl- lge in the person violating its provisions. I cannot help inking that this was the deliberate intention of Parliament.

Let us take sec. 180, subsec. (*e*). What is the meaning of possession" in the first line? It can be taken for granted that at word may usually imply knowledge as stated by Pollock, .B., in *Reg. v. Woodrow, supra.* But "possession" is an in- efinite term. In this section it seems to me that neither own- rship nor knowledge is to be read into the word "possession" or the simple reason that either of them is entirely inconsist- nt with the last part of the subsection "or in whose place or pon whose premises such things are found." In those con- luding words, which can, and I think must, be taken as ex- laining or clarifying the term "possession" the ideas of own- rship or knowledge appear to me to be negatived, and I can- ot see it otherwise.

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If the subsection were intended to constitute two separa offences, that is, one offence for knowingly having and t other for innocently having a still without a license, why is that Parliament has prescribed the same penalty in each cas The former case surely demands the greater penalty. Fr this viewpoint it is difficult to imagine that Parliament h two offences in contemplation. The "or" is obviously not d junctive. As I see it, Parliament was elaborating or maki more clear by the latter part of the section what is to be tak as the meaning of the first. It seems to me this considerati is really unanswerable.

I have noticed a case in the United States Supreme Co Reports, vol. 216, p. 57, where there was under considerati a statute providing one penalty where an act was committ knowingly and another and lesser penalty where the act w done ignorantly.

The concluding words of the subsection are, in my opinio not to be read as constituting a separate prohibition from th in the opening words of the section. They are there for t purpose of giving clarity to the whole subsection. The fa that the information is laid in the words it is, is in this vi immaterial. In any event the finding of the magistrate which he bases the question submitted is in the concludi words and he could have amended and convicted according But from the construction I give the subsection no amendm was necessary.

In *Rex ex rel. Robinson v. Young,* 24 B.C.R. 482, [191 3 W.W.R. 1066, it was held by the Court of Appeal for Br ish Columbia that a temporary physical control of tobacco l longing to another does not constitute an offence within s 356 of *The Inland Revenue Act.* That section differs ma festly in its wording from sec. 180, subsec. (*e*), in lacking concluding words and otherwise has no direct bearing on t case before us. But I wish to refer to the discussion of t word "possession" in the judgment of Martin, J.A. at p. 10 where he points out that it is a word of a wide meaning, up which many different constructions have been placed and th in this *Inland Revenue Act* it is used in several senses, conte plating different states of custody, with or without knowled

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He is dealing with what may be called the tobacco provisions of the Act, which may be considered as intended to be less stringent than those dealing with intoxicating liquors; but his remarks are in point in considering the other sections. Whatever might be meant by the word "possession" in the opening words of subsec. (*e*), without its concluding words is, to my mind, left by them in no doubt whatever.

I am not at all afraid of the possible wrong to an innocent man that has been conjured up as necessitating a judicial mitigation of the severity of the provisions of the Act. It is possible that a malevolent neighbour may, by erecting a still on another's premises, seek to wreak his vengeance on an upright and law-abiding farmer, who has incurred his enmity. It is not absolutely impossible, but it is so remotely improbable as to be worthy of little consideration. It is conceivable that a mischievous aviator might play some such trick. But these things do not happen. The magistrate believed the denial of the accused as he had a perfect right to do. But when I consider the convenient place in which this apparatus was found, the circumstances surrounding the discovery and particularly the fact that the still smelt somewhat strongly of spirits and showed signs of recent use, I cannot refrain from saying that the magistrate took a remarkably lenient view of the indisputable facts.

I would answer the question asked in the negative and, under sec. 765 of *The Code*, remit the matter to the magistrate with this opinion of the Court.

HAGGART, J.A.—This is a case stated by the police magistrate under the provisions of sec. 761 of *The Criminal Code*. Cappan was prosecuted under *The Inland Revenue Act*, R.S.C., 1906, ch. 51, for having without a license under the Act in his possession a still or some parts thereof suitable for the manufacture of spirits without giving the notice necessary under the Act.

It is necessary that the prosecutor should establish that the accused was in possession of the still. Knowledge of the still was denied and it was also denied that the accused had ever manufactured liquor. The magistrate makes an express find-

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ing that he believed the accused had no knowledge of the fact that this chattel was upon his premises.

What is the meaning of the word "possession"? In *Stroud's Judicial Dictionary,* at p. 1518, all goods being in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof.

"It is to be remarked, however, that the words are not now,—and have not been since 6 G. 4, c. 16, s. 72,—what they were when many of the earlier cases were decided. It is pointed out by Parke, B., (*Whitfield v. Brand,* 16 L.J. Ex. 103; 16 M. & W. 282) that they now stand as 'Possession, Order *or* Disposition; instead of Possession, Order *and* Disposition.' [He goes on further to say]: I think, therefore, that it is enough if these goods were in the 'Possession' of the bankrupt in his Trade or Business, although they were not in his 'Disposition' therein, in the sense that they were such things as he sold in his trade. The words 'Order or Disposition' seem to me, necessarily, to enlarge the word 'Possession' so as to include something beyond visible occupation by a Reputed Owner. [The author goes on to say]: If it be said that this construction appears inconsistent with Ld. Watson's words in *Colonial Bank v. Whinney,* 'the principle which appears to me to be deducible from the authorities is this, That goods belonging to a third party are not within s. 44 (iii), [of the Bankruptcy Act, 1883] unless they were left with the bankrupt in such circumstances that, as Reputed Owner, he could have sold them or otherwise obtained credit upon them in the course of his trade or business,'—then I would answer that I understand Ld. Watson to have meant by 'obtaining credit upon goods,' not merely getting a loan by pledging them but, obtaining credit on the purchase of other goods because of the bankrupt appearing to own things valuable for business purposes though not for sale in his business. This construction recommends itself to me as being entirely consonant with the passage quoted in *Colonial Bank v. Whinney* (11 App. Cas. 426, at p. 447, 56 L.J. Ch. 53)" [*Stroud's Judicial Dictionary* 1518, quoting Darling, J. in *Sharman v. Mason* (1899) 2 Q.B. 679, 69 L.J.Q.B. 3, at p. 7.]

The right to make a lawful disposition of the property in goods to a third party is one of the elements or ingredients of possession. The author goes on further to say:

"What meaning then are we to give to these words? Of course, where the goods are in the nature of Stock-in-Trade there is no difficulty; goods apparently forming part of the Stock-in-Trade of the firm must be in the Order or Disposition of the bankrupt in his trade or business. But, in my opinion, the words go further than that. I think the true construction is, that the goods must be in his Order or Disposition for the purposes of, or purposes *connected with,* his Trade or Business." [*Stroud's Judicial Dictionary* quoting Cotton, L.J. in *Colonial Bank v. Whinney, supra.*]

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I do not think that under the circumstances the defendant or accused could be held to be in possession of the goods in question within the meaning of the statute. This disposition of the word "possession" disposes of the question of *mens rea.*

After carefully considering the cases cited to us upon the argument and the reasons given by my brother Judges, I have come to the conclusion that the magistrate was right, and I agree with the majority of the Court when they answer the question in the stated case that the magistrate was right in holding as he did.

I have been permitted to peruse the reasons given by the Chief Justice and Mr. Justice Fullerton, and I agree with the answer given by them to the stated case in the affirmative.

The denial of the accused that he had any knowledge of the still and the further denial that he ever manufactured liquor, and the statement of the magistrate that he believed him, to my mind, settles the question.

We had before us in the case of *Rex v. Hoffman,* reported at 28 Man. R. 7, [1917] 2 W.W.R. 839, 28 C.C.C. 355, a similar question to that before the Court here. It was there found by this Court that it was necessary to bring home the knowledge and consent of the proprietor of the poolroom as to what was taking place. There was no knowledge here that the accused had the still in his possession or control.

FULLERTON, J.A.—An information was laid against Cappan for unlawfully having in his possession a still suitable for the manufacture of spirits without having obtained the license required by *The Inland Revenue Act,* R.S. Canada, 1906, ch. 51.

Sec. 180 of that Act provides that:

> Every person who without having a license under this Act, then in force,—
>
> (*e*) has in his possession, in any place, any such still * * * * *, or any part or parts thereof * * * * is guilty of an indictable offence * * * *.

The police magistrate held that the mere finding of a still or portion of a still upon the property of the accused was not sufficient to justify a conviction unless it were shown that the

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accused had knowledge of its existence on his property. He declined to make a conviction and at the instance of the Crown stated a case under the provisions of sec. 761 of *The Criminal Code*.

The still was found covered with a sack in a shed situated upon the premises of the accused, not far from the house. The accused denied all knowledge of the still and also denied that he ever manufactured liquor and the police magistrate believed him.

We are now asked to construe the Act in such a way as to justify the conviction of an innocent man and make him subject to a penalty not exceeding $500 and not less than $100 and to imprisonment, with or without hard labour, for a term not exceeding 12 months and not less than one month.

The contention of the Crown is that the mere finding of the still on the premises of an accused person is sufficient. The Act, however, uses the words "has in his possession in any place." I think the answer to the contention of the Crown is that there is no evidence to show that the accused ever had the still in his possession. How a man can be said to be in possession of something he knows nothing whatever about, I am at a loss to understand.

In the case of *Rex v. Hoffman,* 28 Man. R. 7, [1917] 2 W.W.R. 839, 28 C.C.C. 355, the accused was charged with unlawfully having liquor in a place other than his private dwelling. The evidence was that one of several men in the poolroom, of which the defendant was the proprietor, took a bottle of whiskey from his pocket, drank from it and gave it to others to drink from without the knowledge or consent of the proprietor though he was in the room at the time. The Court quashed the conviction holding that the evidence did not show that the accused had liquor in a place other than the private dwelling-house in which he resided.

Perdue, C.J.M., at p. 20 (28 Man. R.) said:

> The charge in this case is that the accused "did unlawfully have liquor" in a place other than his dwelling house without a license under the Act * * * * the intention clearly is that it must be shown that the person charged *had* the liquor in his possession or charge or control. Proof that liquor was brought upon his premises surreptitiously, without his know-

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ledge or consent, does not render him guilty of an offence. The statute did not intend that a man should be declared guilty in such a case. It is incredible that there was any intention of authorizing so monstrous an injustice. The prohibition in the statute is that no person "shall have" liquor on the premises, not that he shall be liable if there "is" liquor upon the premises.

Rex v. Borin, 29 O.L.R. 584, 5 O.W.N. 412, 22 C.C.C. 248, is to the like effect.

Counsel for the Crown, in support of his contention, cited a number of cases which deal with the construction of statutes passed for the protection of the revenue.

For example *Reg. v. Woodrow,* 15 M. & W. 404, 16 L.J. M.C. 122.

There the accused was charged with having in his possession adulterated tobacco contrary to 3 & 4 Vict., ch. 18, sec. 3. The possession of the tobacco by the accused was proved, but it was found by the Court that he had purchased the tobacco of a manufacturer as genuine tobacco, and believed that the tobacco seized was genuine, and that he had no knowledge or cause to suspect that the tobacco had been adulterated. The Court of Exchequer, consisting of Pollock, C.B., Parke, Alderson and Rolfe, BB., held that want of knowledge was no answer.

Pollock, C.B. at p. 415, said:

It is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality. If this were the case of provisions, or of any matter that affected the public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness whether they know it or not; they are bound to take care.

Parke, B., at p. 417, said:

If a man is in possession of an article * * * and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved.

I cannot think cases of the class of the last-mentioned case have any bearing on the question before us which is whether or not the accused can be said to have been in possession of the still.

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If the case were that the defendant knew that the article, which was in fact a still, was in the shed but did not know that it was a still, the case would be in line with the *Woodrow Case, supra.*

Some remarks of the Judges in the last-mentioned case show clearly what their view of "possession" is. Pollock, C.B. at p. 415:

> It appears to me, that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco, (*indeed, a man can hardly be said to be in possession of anything without knowing it*), it is not necessary that he should know that the tobacco was adulterated.

Alderson, B. at p. 418:

> I cannot say that this man had not the tobacco in his possession, because he clearly knew it. He did not know that it was in an adulterated state, but he knew he had it in his possession; and the question of "knowingly," it appears to me, is involved in the word possession. That is, a man has not in his possession that which he does not know to be about him. *I am not in possession of anything which a person has put into my stable without my knowledge.* It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned.

Where it is established, as it is here, that the accused had no knowledge of the still, although it was in a shed on his land, I hold that there is no proof of possession by the accused.

I would answer the question in the stated case in the affirmative.

DENNISTOUN, J.A.—Sec. 180 (*e*) of *The Inland Revenue Act,* R.S.C., 1906, ch. 51, appears to set forth an offence with two branches. Every person who * * * (a) has in his possession any such still, worm, etc. (b) or in whose place or upon whose premises such things are found * * * is guilty of an indictable offence.

I agree with the reasoning and conclusions of the Chief Justice that possession in this case includes knowledge either personally or through another; and that the magistrate was right in refusing to convict when he had satisfied himself that the accused had no such knowledge of the existence of the still which was found upon his premises.

The charge was laid under (a) not (b) above stated. It is therefore unnecessary for the decision in this case to consider

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what may be irrebuttable presumptions in the case of a charge of finding a still, etc., upon a person's property without any knowledge on his part that such things are there; and I express no opinion upon the meaning of the words "place or premises." They may or may not have reference to occupation or control. They may or may not include a property which the accused possesses, but has never visited or dealt with, directly or indirectly. I prefer to decide these points when they arise.

Stroud, in his work on *Mens Rea*, at p. 12, says:

It can seldom be demonstrated that a man properly convicted has been perfectly innocent, in the sense of having entertained no particle or scintilla of legal blameworthiness.

Where any such case is found to occur, it must always be attributable either to a legal presumption, grounded upon general impracticability of proof, and existing at common law, or else to some extraordinary provision of statute law, creating, in effect, what may be called a *quasi-crime*.

It is a familiar doctrine that an Act of Parliament can do anything. The law recognizes no limits to its power, but such limits exist in fact. Even an Act of Parliament cannot make a man really guilty of a particular offence, when he is in fact innocent of any degree of intention to break the law.

But an Act of Parliament can require all Courts and all persons to treat such an individual in all respects *as if* he were guilty, however innocent he may be in reality. This is precisely what certain modern statutes have done, with the result that, in connection with certain prohibitions, as to adulteration of food, sale of liquors and a few other matters, innocent people are occasionally "convicted" in a criminal court in the same manner, and with the like consequences, as if they were guilty of the specified crimes charged against them.

In all such cases the justification of the arbitrary interference with liberty is precisely similar to the justification of all the common law presumptions above referred to, viz., the difficulty which would ensue, or which it has been thought would ensue, in enforcing the statutory provisions in question, if the existence or absence of culpable intentionality were inquired into.

The Courts have always been extremely chary of reading into Acts of Parliament an implied intention to treat perfectly innocent people as if they were guilty, but they have shown less reluctance in construing statutes as casting upon the defendant the onus of proving a higher degree of care and deligence than that ordinarily exigible in dealing with certain specified matters specially provided for by the Legislature.

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In all cases a departure from the ordinary doctrine of *mens rea* must be justified by the express terms of a statute or by necessary implication.

Mens rea is absent in many of the cases referred to on the argument before this Court which are referred to below, nevertheless convictions against the accused principal or employer were sustained for the reason that some person for whom or for whose acts the accused was directly or indirectly responsible had a guilty knowledge in respect to the violation of the statutory prohibition in question, or in any event was charged with a peremptory duty by reason of the statute which he failed to perform.

For selling or offering for sale adulterated milk, or tobacco or meat unfit for human consumption the accused may have had no *mens rea,* but he had a *mens* of some sort, he had assumed some mental attitude in reference to the prohibited article, and had dealt with it himself or through an agent. That being so the statute cast the duty upon him of protecting the public at any cost, and the fact that he had no *mens rea* as to the drugs in the tobacco, or the water in the milk, or the rottenness in the meat, made no difference.

But there has been no case quoted in which a conviction was sustained where the Court was satisfied that the accused had no knowledge whatsoever of the existence of the prohibited article, and no connection with it through the agency of another; where in fact he had taken no mental attitude of any sort or description in reference to the matter and could not do so being in complete ignorance not only of the thing itself, but of any duty under the statute connecting it with himself.

For a Court to convict under such circumstances would to my mind be such an injustice as the Legislature never contemplated when it passed this drastic law.

When the statute refers to "possession" it means, in my opinion, to presuppose knowledge, or at least a dereliction of duty of some sort either on the part of the accused or of some person who stands in his place.

When the statute refers to an article being "found" on the place or premises of the accused it means found in such a way as to create a conclusive presumption of knowledge on the part

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of the accused, that he has violated the duty cast upon him by the provisions of the statute; but if at the trial it is abundantly clear to the Court that the accused has never formed, or had an opportunity of forming any mental attitude in respect to the articles "found," that they have, as suggested by my brother Cameron, been deposited by a mischievous aviator, or a malignant neighbour, I think the magistrate should refuse to convict.

If this is not the meaning of the Legislature the Act can be amended to make the meaning clear; but so long as the wording remains as it is I feel constrained to hold that it was not the intention to impose a severe penalty upon a person who has unequivocally established a position which shows that a conviction would mean nothing short of rank injustice.

In the case under consideration the magistrate apparently had no difficulty in deciding that the accused did not have the still in his possession for neither he nor any person acting for him knew of its existence.

Had the charge been for "finding" a still upon his place or premises, and the evidence being as it was, that the still was found in the woodshed close to his residence, I think the magistrate might very properly have convicted in the absence of absolutely convincing evidence that the accused and all connected with him were free from knowledge of any kind that the still was on the premises, and had not fallen short of that degree of careful investigation and inquiry which the law requires.

Had the accused been able to satisfy the Court of his innocence and to account in a satisfactory manner for the presence of the still upon his property, the magistrate would, in my opinion, have been justified in acquitting him, and was not compelled by the words of this drastic act to convict one whom he knew to be innocent, in the fullest sense of the term.

In the cases relied on by counsel for the appellant, such as *Parker v. Alder* [1899] 1 Q.B. 20, 68 L.J.Q.B. 7, 19 Cox C.C. 191, in which milk was adulterated by a stranger without the knowledge of the accused, and the numerous cases under *The Sale of Food and Drugs Act* there was in all of them knowledge on the part of the accused or those acting for the ac-

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cused of the existence of the milk, meat, tobacco or other product, and a statutory duty was laid upon them as vendors to protect the public against adulteration. The fact that the accused did not prevent the adulteration from taking place, or detect that it had taken place was held to be no sufficient excuse.

To put the case under consideration on a par with the cases referred to, if the accused Cappan had been found in possession of a still, and had put forward the defence that he had no knowledge of stills and did not know what the machinery found on his premises really was, it would have availed him nothing even if the magistrate believed him. So soon as his mind was directed to the existence of the prohibited articles the duty was cast upon him of knowing what they were, and of keeping them at his peril.

I cannot assume that the Legislature intended to impose a minimum penalty of $100 fine upon an accused person who was able to satisfy the magistrate that he had no knowledge, personal or through any person acting for him, of the existence of the prohibited articles.

It was pointed out by Wills, J., in *Parker v. Alder, supra,* that the adulteration of the milk of the accused by a stranger was an offence under drastic legislation which is meant to be so, but in construing the intention of the Legislature he points out that the magistrate has power to dismiss the charge without inflicting a punishment, if he considers the offence to be of a trifling nature.

There is no such power in this case, and no discretion is given to the magistrate except to adjust the fine between the sums of $100 and $500 with or without imprisonment at hard labour, and from this the inference is drawn that the Legislature did not contemplate a conviction in a case where a still being "found" its presence was satisfactorily explained, by the accused.

Among the cases considered are the following, in each of which the accused person had taken some mental attitude or assumed some responsibility in respect to the *res gestae* before trial: *R. v. Dias,* 1 C.C.C. 534, liquor license; *R. v. Labbe,* 17

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C.C.C. 417, motor vehicle; *Cundy v. LeCocq*, 13 Q.B.D. 207, 53 L.J.M.C. 125, sale to drunken person; *Rex v. Brennan*, 35 N.S.R. 106, still; *Rex v. Kennedy*, 35 N.S.R. 266, still; *Reg. v. Prince*, L.R. 2 C.C. 154, at p. 163, 44 L.J.M.C. 122, girl under 16; *Reg. v. Woodrow*, 15 M. & W. 404, 16 L.J.M.C. 122, adulterated tobacco; *Blaker v. Tillstone* [1894] 1 Q.B. 345, 63 L.J.M.C. 72, unsound meat; *Mallinson v. Carr* [1891] 1 Q.B. 48, 60 L.J.M.C. 34, meat; *Mullins v. Collins*, L.R. 9 Q.B. 292, 43 L.J.M.C. 67; *Brown v. Foot*, 61 L.J.M.C. 110, 17 Cox C.C. 509; *Parker v. Alder, supra*, adulterated milk; *Reg. v. Bishop*, 5 Q.B.D. 259, 49 L.J.M.C. 45, receiving lunatics; *Brooks v. Mason* [1902] 2 K.B. 743, 72 L.J.K.B. 19, intoxicating liquors; *Rex ex rel. Robinson v. Young*, 24 B.C.R. 482, [1917] 3 W.W.R. 1066, tobacco.

The magistrate having dealt with this case as one of "possession" only, I think he was right in refusing to convict. If he had dealt with it as one of "finding upon the premises" he might well have convicted by reason of the place and proximity to the residence of the accused in which the still was found, for there is a duty cast upon all persons to exercise a high degree of diligence to keep their premises free from articles which may be used for illicit distillation.

I would answer the magistrate's question in the affirmative.

Question answered in the affirmative, Cameron, J.A. dissenting.

COURT OF APPEAL

BOWEN V. LIGHTFOOT ET AL

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Animals—Damages—Breach of Statutory Duty—Dog Running at Large Contrary to Municipal By-Law—Attacking Person—Liability of Owner—No Liability for Damages in Absence of Scienter.

The fact that a dog is running at large contrary to a municipal by-law does not make its owner liable in damages to one bitten by it; the owner is liable in damages only if he knew that the dog was viciously disposed.

ARGUED: 2nd March, 1920.
DECIDED: 6th April, 1920.

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Statement.

APPEAL by plaintiff from the dismissal of his action for damages from at attack made upon him by two dogs. Appeal dismissed with costs, Haggart, J.A. dissenting.

J. C. Collinson, for plaintiff, appellant.

W. W. Kennedy, for defendants, respondents.

PERDUE, C.J.M. and CAMERON, J.A. concur in dismissing the appeal.

HAGGART, J.A. (dissenting) would allow the appeal.

FULLERTON, J.A.—The defendant was attacked on a public street in the city of Winnipeg by a bulldog and a bitch; his clothes were torn and he was severely bitten.

The defendant Wilkes was the owner of the bulldog. So far as Wilkes is concerned the only evidence of *scienter* is that of the plaintiff himself, who says that some months before he received the injuries complained of, he and the defendant Wilkes were engaged in fixing a piano wagon, that the bulldog came along and he went to pat him, when Wilkes said, "Oh, don't put your hands on that dog, for he ain't safe." If I had been trying the case, I would have held this sufficient evidence of *scienter*. The learned trial Judge, however, took the contrary view and we should not interfere.

The defendants James Lightfoot and George Lightfoot were sued as doing business under the name, style and firm of "Lightfoot Transfer Co." and George Lightfoot was sued individually.

There is no evidence in the case which would justify a verdict against the partnership.

The business was apparently carried on by the defendant George Lightfoot. There is no evidence whatever to show that George Lightfoot had any knowledge of the vicious character of the dogs.

It is contended, however, that such proof of the *scienter* was unnecessary as the dogs were, at the time of the attack, running at large contrary to a by-law of the city of Winnipeg.

In other words, the plaintiff contends that a breach of a statutory duty followed by damage gives rise to a cause of action.

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The leading case on the subject and which has been approved and followed in all subsequent cases, is *Cox v. Burbidge,* 13 C.B. (N.S.) 430, 32 L.J.C.P. 89. In this case the plaintiff, a little boy about five years of age, was playing in the road, when a horse, which was on the footpath, struck out and kicked him in the face, injuring him severely.

Sec. 25 of *The Highway Act,* 1864 (Imp.) made it unlawful, except where there are wastes or unenclosed lands, to allow animals to stray on to the highway, and the owner is liable to a fine if he does so.

The Court, consisting of Erle, C.J., Williams, Willes and Keating, JJ. held that the plaintiff could not recover.

The argument for the plaintiff was that the fact of the horse being loose on the highway contrary to the statute was *prima-facie* evidence of negligence.

Erle, C.J. at p. 435, said:

> As between the owner of the horse and the owner of the soil of the highway or of the herbage growing thereon, we may assume that the horse was trespassing; and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under *The Highway Act.* But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff * * * * * I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it * * * * * It reduces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse, without more.

Hadwell v. Righton [1907] 2 K.B. 345, 76 L.J.K.B. 891, was the case of a fowl flying into the spokes of a bicycle causing it to upset.

Phillimore, J., on the assumption that the fowls were unlawfully upon the highway, held that the damage which in fact happened was not of such a nature as was likely to result from their unlawful presence there and that the defendant was not liable.

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To the same effect is the case of *Heath's Garage Limited v. Hodges* [1916] 1 K.B. 206, 85 L.J.K.B. 485.

The leading English cases on the point are reviewed in *Millar v. O'Dowd,* 36 N.Z. Rep. 716.

In *Nass v. Eisenhauer,* 41 N.S.R. 424, the plaintiff sought to recover damages from the defendant for injuries to plaintiff's ox caused by defendant's oxen which were at the time upon the public highway in violation of a by-law of the municipality.

The Court of Appeal held that without proof of *scienter* the defendant could not be held liable.

The by-law in the case under consideration does not, therefore, help the plaintiff, and there can be no recovery.

DENNISTOUN, J.A.—The plaintiff claims damages from the defendants by reason of an attack made upon him in the public streets of Winnipeg by two bulldogs, which he alleges were owned or harboured by the defendants. He bases his action on two grounds—first, that the defendants knew that the dogs were vicious, and alternatively, that they were on the highway contrary to the provisions of by-law No. 1603, sec. 31, of the city of Winnipeg, which reads as follows:

> No person or persons shall permit or suffer his, her or their dog, and no dog shall be permitted or suffered to run at large in the city without a collar and metallic plate mentioned in section 27 of this By-law, nor unless such dog is accompanied by and is under the immediate charge and control of some competent person, and any dog found running at large, contrary to this provision, shall be liable to be captured and disposed of as hereinafter provided.

A well-known case on action for damages for breach of statutory duty is *Groves v. Wimbourne (Lord)* [1898] 2 Q.B. 402, 67 L.J.Q.B. 862. This was a case under *The Factory and Workshop Act* of 1878. It imposes a duty to fence certain machinery. The Act is a public Act, passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit. It was held that an injured workman had an action for breach of statutory duty notwithstanding the provisions in the Act that the employer should be liable to fine in respect to that

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breach of duty. In dealing with the intention of the Legislature it is material, as Kelly, C.B. pointed out in giving judgment in the case of *Gorris v. Scott*, L.R. 9 Ex. 125, 43 L.J. Ex. 92, to consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons.

In the case under consideration there can be no doubt that the by-law prohibiting dogs from running at large was passed in the interest of the general public and not of any class of citizen.

Tompkins v. Brockville Rink Co., 31 O.R. 124, at p. 133, is a case in which Sir William Meredith, C.J., dealt with the claim for damages of a plaintiff who alleged that his property would be depreciated in value, and his insurance premiums increased by reason of the erection of the defendant's building in contravention of a fire by-law of the town of Brockville. He says at p. 130:

> When one looks at the number of acts lawful to be done at common law which municipal councils are by the Municipal Act permitted to prohibit or to regulate, and the number of duties which do not exist at common law which they are permitted to impose * * * one is startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the nonperformance of it.

And at p. 132:

> The proper conclusion to be come to on the main question is, I think, that no such right of action as the plaintiff asserts is vested in him.

In *Ward v. Hobbs*, 4 App. Cas. 13, 48 L.J.Q.B. 281, the defendant, in violation of *The Contagious Diseases (Animals) Act*, sent pigs to market which were suffering from typhoid fever. They were bought by the plaintiff without warranty subject to previous inspection. The pigs died and infected other pigs of the plaintiff and he sued for damages relying on the violation of the statute as sufficient to maintain his cause of action. It was held that the Act was passed for the benefit of the public and has nothing to do with the bargains of particular persons: (Lord O'Hagan at p. 28).

This case was followed in Saskatchewan in an action based on a violation of *The Noxious Weeds Act*, R.S.S., 1909, ch.

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122 (now 1912-13, ch. 39) on the ground that an individual had no right of action under the statute which he did not have without it. *Nargang v. Kirby,* 4 Sask. L.R. 309, 18 W.L.R. 625.

In *Baldry v. Fenton,* 7 Sask. L.R. 203, 6 W.W.R. 1441, 29 W.L.R. 258, it was held that a right of action accrued to a plaintiff whose horse fell into an open well of the defendant. The statute, R.S.S., 1909, ch. 124, sec. 2, provides:

> (2) No person shall have on his premises or on any premises occupied by him any open well or other excavation in the nature thereof of a sufficient area and depth to be dangerous to stock and accessible to stock of any other person which may come upon or stray upon such premises.

The judgment is based on *Butler* or *Black v. Fife Coal Co.* [1912] A.C. 149, 81 L.J.P.C. 97, and *Watkins v. Naval Colliery Co.* [1912] A.C. 693, 81 L.J.K.B. 1056, but an examination of these cases and of the statute quoted clearly shows that the legislation referred to was passed in the interest and for the benefit of a particular and specified class of persons, workmen or stock owners, and that a right of action for breach of the statutory duty was given to such persons in accordance with the rules laid down in *Grove v. Wimbourne (Lord), supra.* The intention of the Legislature to enlarge the common-law rights and liabilities of the respective parties is apparent.

In *Moon v. Stephens,* 8 Sask. L.R. 218, 8 W.W.R. 1165, 31 W.L.R. 832, two mules running at large in contravention of, and contrary to, a by-law of the municipality, trespassed upon the plaintiff's property and caused damage. The defendant was held liable, but, I take it, was liable at common law, the breach of the by-law being taken as evidence of negligence on his part and not the foundation of the right of action.

Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, the company will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants: per Lord

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Atkinson in *G.T.R. v. McAlpine* [1913] A.C. 838, at p. 846, 83 L.J.P.C. 44. This is another example of legislation in favour of specified classes as distinguished from the general public and moreover by sec. 385 of *The Railway Act,* 9-10 Geo. V., ch. 68, a cause of action is declared to exist by the express words of the statute itself.

In *Zumstein v. Shrumm,* 22 O.A.R. 263, the judgment of the Court of Appeal for Ontario was given by Hagarty, C.J.O., to the effect that the owner of a turkey cock which, without negligence, strays upon the highway contrary to a by-law of the municipality is not liable for damages resulting from a horse taking fright and running away at the sight of the bird acting as turkey cocks generally do. Disobedience of the by-law was distinctly raised on the argument by Moss, Q.C., but the Chief Justice disposed of the case on the ground that there was

> no evidence from which negligence on the defendant's part could be proved or presumed or any knowledge possessed by him of the possibility of his turkey cock acting so as to frighten horses.

The law in the United States on this subject is collected in *Corpus Juris, sub nomine* "Animals," vol. 3, secs. 324 to 340. It varies in different states and as laid down by different Courts, but as a general rule it appears that *scienter* continues to be an element of liability unless expressly dispensed with by the statute. *Vide* sec. 340.

The owner of a dog is no doubt answerable at common law for damages of a certain class caused by such dog when negligently running at large, but such owner is not liable for damages caused by the dog which could not be contemplated in the absence of any knowledge that the dog was so disposed. *Turner v. Coates* [1917] 1 K.B. 670, 86 L.J.K.B. 321.

In my opinion this by-law was intended to license, regulate, and restrain, as well as to tax, dogs and was passed for the benefit of the public and not of any particular class, and that a breach of it does not impose any other or greater obligations upon the owner than those imposed at common law, excepting, of course, the penalties provided by the by-law itself, which are confiscation and fine.

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The view is taken that the prohibition contained in the by-law is as valid as a direct enactment of the Legislature itself, but that it was not within the contemplation of the Legislature, or the city council, to do more than regulate the running of dogs upon the streets. It was never contemplated that the owner of a dog would be subject to more than the prescribed penalties for a violation of the by-law. Had it been otherwise an unattended dog upon the highway, without any negligence on the part of his owner, might subject that owner to heavy damages by interfering with motor traffic, frightening horses, and so forth. I am unable to agree that the numerous municipal by-laws which are in operation have overturned the common-law rights of the citizens to any greater degree than is necessary to give effect to the clearly expressed purpose of those by-laws, or that it was the intention of the Legislature to make non-performance of a duty imposed by a by-law statutory and actionable negligence, unless such intention expressly or impliedly appears as part of the enactment.

Upon the authorities the conclusion is reached that the presence of these dogs upon the highway in contravention of the by-law in itself gave no right of action to the plaintiff. In attacking the plaintiff they were displaying a degree of ferocity for which the defendants can only be held responsible at common law if they knew that the dogs were so disposed and failed to prevent them from coming into contact with the plaintiff.

The learned County Court Judge granted a nonsuit on the ground that there was not sufficient evidence of *scienter* as to viciousness in the dogs. There was no jury in the case, and had he called upon the defence his judgment would have been the same. I do not feel justified in reversing him on this point as the evidence is not sufficiently strong to convince me that he was wrong.

I would dismiss the appeal with costs.

Appeal dismissed with costs, Haggart, J.A. dissenting.

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COURT OF APPEAL

1920

STERLING ENGINE WORKS LIMITED
v. RED DEER LUMBER COMPANY, LIMITED

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Contracts—Sale of Goods—Contractor Adding Materials in Repairing Engine—Latent Defect in Materials—Whether Contract for Sale of Goods or for Work and Labour—Whether Contractor Liable.

The fact that in repairing an engine for the owner the contractor adds materials of his own which he has purchased for such work does not cause such new materials to pass by sale on the re-delivery of the engine to the owner so as to make the contractor liable under the implied condition arising under sec. 16 (a) of *The Sale of Goods Act*, R.S.M., 1913, ch. 174, that the goods shall be reasonably fit for the purpose required; the contract is one for work, labour and materials, and in the absence of negligence the contractor is not liable for latent defects in the materials.

Judgment of Galt, J. ([1919] 2 W.W.R. 519) reversed.

ARGUED: 11th March, 1920.
DECIDED: 6th April, 1920.

Statement.

Appeal by plaintiff from a judgment by Galt, J. ([1919] 2 W.W.R. 519) in an action for balance of account for repairs to a locomotive. Appeal allowed with costs.

A. E. Hoskin, K.C. and *J. C. Collinson,* for plaintiff, appellant.

A. C. Ferguson and *E. G. P. Baker,* for defendant, respondent.

PERDUE, C.J.M., CAMERON, and HAGGART, JJ.A. concur.

FULLERTON, J.A.—This action is for work and labour done and materials supplied in connection with the repair of an engine.

The main defence is that the plaintiff used inferior materials in repairing the fire-box of the engine, which necessitated the work being done over again. Some months after the repairs had been completed the defendant discovered that portions of the plates in the fire-box had become laminated or blistered. It is admitted that this was due to a latent defect which could not be detected by the plaintiff.

The only question to determine in this appeal is whether the contract in question is one for the sale of goods or for

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work, labour and materials supplied. If the former, then an implied condition that the goods shall be reasonably fit for the purpose required will arise by virtue of sec. 16 (*a*) of *The Sale of Goods Act*, ch. 174, R.S.M., 1913, and the fact that the defects were latent will not excuse the vendor.

The learned trial Judge ([1919] 2 W.W.R. 519) bases his decision in favour of the defendant on the assumption that the contract was for the sale of goods. He says in his judgment: "I am of the opinion that when the locomotive was redelivered by the plaintiffs, all the new material in it passed by sale to the defendants."

Benjamin on Sale, 5th ed., at p. 164, lays down the following proposition:

> Where the employer delivers to a workman either all or the principal materials of a chattel on which the workman agrees to do work, there is a bailment by the employer, and a contract for work and labour, or for work, labour and materials (as the case may be), by the workman.
>
> Materials added by the workman, on being affixed to or blended with the employer's materials, thereupon vest in the employer by accession, and not under any contract of sale.

Benjamin, p. 162:

> The principles already discussed have shown that a contract of sale is not constituted merely by reason that the property in the materials is to be transferred to the employer. If they are simply accessory to work and labour, the contract is for work, labour, and materials.

Benjamin, p. 163:

> Where the contract is made to furnish a machine or a movable thing of any kind, and [before the property in it passes] to fix it to land [or to another chattel], it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables as such, but to improve the land [or other chattel, as the case may be]. The consideration to be paid to the workman is not for a transfer of chattels, but for work and labour done and materials furnished.

Beven, in his work on *Negligence*, speaking of the duties of a bailee under a bailment *locatio operis faciendi*, says, at p. 808:

> In this species of bailment every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes * * * * * He is required to bestow ordinary diligence, and that care and prudence which the average prudent man takes in his own concerns. For the contract is for mutual benefit; therefore the bailee is

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not answerable for slight neglect, nor for a loss by inevitable accident or irresistible force, or from the inherent defect of the thing itself, unless he took the risk on himself; he is only answerable for ordinary neglect.

The contract in question here was not a contract for the sale of goods but for work, labour and materials supplied. *The Sale of Goods Act* therefore has no application.

I would allow the appeal with costs and direct that judgment be entered in favour of the plaintiff for the amount claimed.

The cross-appeal of the defendant will be dismissed with costs and the counterclaim dismissed with costs.

DENNISTOUN, J.A.—The point for decision on this appeal is whether or not there is an implied condition that materials supplied are free from latent defects, the contract being for work, labour and materials done and furnished in making general repairs to a locomotive engine the property of the defendant company.

The defective materials consisted of two steel plates which were built by the plaintiff company into the fire-box of the defendant's locomotive and which after return of the engine to the defendant and user for several months became useless through latent defect. The fire-box appears to have been built of new materials throughout.

It was admitted by counsel on the argument before this Court that the defect was latent and that there was no evidence of negligence on the part of the plaintiff.

The plaintiff sued for $849.45, balance unpaid of an account for $3,349.45, which was the total amount charged for the work and labour and materials which were furnished on a time and material basis.

The defendant counterclaimed for $4,600 damages and such counterclaim was treated as an action for breach of warranty, under sec. 52 of *The Sale of Goods Act*, R.S.M., 1913, ch. 174, by the trial Judge who gave damages to the defendant by wiping off the account sued for and allowing the sum of $37.20 in addition thereto ([1919] 2 W.W.R. 519).

It may be noted that the value of the work and materials supplied by the plaintiff was $3,349.45, of which sum the

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materials supplied for the fire-box were charged at $461.14, and of these materials, the learned trial Judge finds, that portions of two steel plates costing $37.20 were defective.

Negotiations between the plaintiff and defendant for the replacement of these defective plates having failed, the defendant sent its engine to Winnipeg at large expense and paid other repairers the sum of $2,000 for replacing the laminated plates with new steel.

The contract was not, as I construe it, a sale of goods within the meaning of sec. 16 of *The Sale of Goods Act,* R.S.M., ch. 174, which is in part as follows:

(*a*) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose.

There is no evidence to suggest that the plaintiff, The Sterling Engine Company, Limited, was a vendor of, or dealer in steel plates. Their business appears to have been to repair engines. They did not sell any steel plates as such to the defendant. What they did was to rivet certain steel plates which they purchased in the market as suitable for this job, to the defendant's engine, to build them into it, in the course of making general repairs, which included the reconstruction of the fire-box, so that the title in the plates passed to the defendant not by bargain and sale as held by the learned trial Judge, but by accession: *Seath v. Moore,* 11 App. Cas. 350, 55 L.J.P.C. 54; *Benjamin on Sale,* 5th ed., p. 164; *Clark v. Bulmer,* 11 M. & W. 243, at p. 249, 1 D. & L. 367.

The case under consideration differs materially from *Jones v. Bright* (1829) 5 Bing. 533, 3 M. & P. 155, which was much relied on. In that case the defendant was a manufacturer of copper sheathing which the plaintiff purchased and placed upon his ship. The material being unfit for the purpose for which it was purchased the defendant was held liable in damages.

Had Bright been employed as a shipwright by Jones to sheathe his ship with copper and incidentally to supply a

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number of plates in connection with his contract for work and labour, I do not think he would have been held responsible for latent defects in the plates which he supplied as an accessory to his contract without any negligence on his part.

In order to recover upon his counterclaim in this case the defendant must show under the statute quoted: That he bought the goods from the plaintiff which it was the seller's business to supply relying on the seller's skill or judgment as to the particular purpose for which the goods were required.

There is no evidence to support such a contract and, in my opinion, the defendant cannot maintain his counterclaim under the statute.

Has he then any remedy at common law? The learned trial Judge in opening his reasons for judgment says that the question does not appear to have arisen in any case hitherto reported. That being so, the view is forced upon one that an implied warranty against latent defects in materials furnished under a contract for work, labour and materials, is not recognized at common law.

There can be no doubt that under such a contract there may be an action for damages by reason of negligence or lack of skill on the part of the contractor, but no authority has been cited which would make him liable for a latent defect which was due to no act or omission on his part.

It is often difficult to determine the nature of the contract. The point is a narrow one and may appear to create on occasions an anomalous situation in respect to the rights of the parties, but once it has been determined whether the contract be one of sale or to furnish work, labour and materials, the duty of applying the recognized rules of law is free from difficulty.

The learned trial Judge determines the character of the contract in the following words (at p. 530):

> Under the authorities set forth, I am of opinion that when the locomotive was redelivered by the plaintiffs, all the new material in it passed by sale to the defendants, with all the rights incident to sale.

With great respect I am of the opinion that the ownership of each plate, rivet or other particle of material built into the

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defendant's engine by the plaintiff passed to the defendant at the time it was affixed to that engine and not otherwise. *Clark v. Bulmer, supra.*

Further that there was no contract of sale, but a contract for general repairs which included the furnishing of new materials where necessary, and that the plaintiff was not liable in damages for latent defects in materials which it did not manufacture, did not keep for sale, and which so far as it knew or could ascertain by inspection were fit for the purpose to which they were applied. *Ellis-Chalmers, Bullock v. Walker,* 21 Man. R. 770, 15 W. L. R. 357; *Beven on Negligence,* Can. ed., pp. 804-808; *Benjamin on Sale,* 5th ed., p. 164; *Randall v. Newson,* (1877) 2 Q.B.D. 109, 46 L.J.Q.B. 259.

I would allow the appeal and enter judgment for the plaintiff for $849.45 with interest from the date of the issue of the statement of claim with costs in the Court of King's Bench and the Court of Appeal. The counterclaim and cross-appeal should be dismissed with costs.

Appeal allowed with costs.

COURT OF APPEAL

DONER v. LOOSE

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Agency—Real Estate Agent's Commission—Commission Earned on Producing Purchaser—Purchaser Failing to Carry out Agreement—Ineffectiveness of Alleged Condition re Commission At Time of Sale.

Plaintiff found a purchaser for defendant's land, the amount of commission was agreed on, and an agreement of sale executed. On the date of the agreement of sale, and before its execution, plaintiff's agents submitted for defendant's signature a letter agreeing to pay the commission for "having this day effected a sale," but exception was taken to this by defendant's solicitor who drew another form of letter which, after execution of the agreement of sale, was signed by the defendant, agreeing to pay the commission "in the event of a sale being completed," and it was contended by defendant that, especially in view of the negotiations leading to it, this meant that the commission was only to be payable on the purchaser paying in full the cash payment and executing

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certain documents referred to in the agreement of sale, and as the purchaser subsequently refused to carry out the sale no commission was payable. *Held*, reversing judgment of Macdonald, J. ([1920] 1 W.W.R. 551) that plaintiff was entitled to the commission. If the letter constituted an agreement all oral evidence of the negotiations leading to it were improperly admitted; there was no satisfactory evidence of acquiescence in it by plaintiff, and even if assent were proved the agreement was ineffective for want of consideration; if it were only a letter and the conversations leading to it were admitted it could not affect plaintiff's right to the commission which had been earned on production of a purchaser ready, willing and able to purchase the property.

ARGUED: 28th April, 1920.
DECIDED: 11th May, 1920.

Statement.

APPEAL by plaintiff from the dismissal by Macdonald, J. of her action for commission on a sale of farm lands and chattels. Appeal allowed with costs.

MACDONALD, J.—This is an action for recovery of commission on the sale of farm lands and chattels, the property of the defendant.

An agreement was entered into (Ex. 4) between the defendant as vendor and Calvert Bleasdale of Chagrin Falls, Ohio, U.S.A., as purchaser, whereby the vendor agreed to sell to the purchaser certain lands in the province of Manitoba for the sum of $41,000, and the purchaser agreed to transfer and convey to the vendor, certain house property in Chagrin Falls aforesaid, the consideration being $3,500 and this amount was to be applied on the purchase-price of the farm lands, and the balance to be paid as in the said agreement provided.

The vendor further agreed to sell and the purchaser to purchase certain farm implements, at the price or sum of $6,000, payable as in the said agreement provided.

Real-estate agents claiming the commission brought the parties together and if a sale were completed would, under ordinary circumstances, be entitled to a commission and the plaintiff as assignee of the claim entitled to succeed in this action.

In the statement of claim, as originally filed, the plaintiff based her claim upon an agreement (Ex. 3), which agreement is in the words and figures following:

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MACDONALD J.

Winnipeg, Manitoba,
September 5th, 1917.

Doughie, Jack & Lyons,
Somerset Building,
Winnipeg, Manitoba.

Dear Sirs:—

This is to say that in the event of a sale being completed by me to C. Bleasdale of my farm and chattels at St. Adolphe, lots 17, 18 and 19, St. Norbert, I agree to pay you a cash commission of $1,000. This is to be accepted by you in full.

Yours truly,
Elmir P. Loose.

The statement of claim was subsequently amended by which the plaintiff struck out the claim under the agreement (Ex. 3) and substituted the ordinary claim for commission on sale and also by adding an alternative claim for commission on a sale subsequently claimed to have been made of the same property to one Barker.

Although there was this amendment to the statement of claim, striking out the claim under the agreement (Ex. 3), the plaintiff, at the trial, filed the said exhibit and relies upon it for the recovery of the commission on the sale to Bleasdale.

There is considerable conflicting evidence with respect to this exhibit. During the course of negotiations the parties attended the office of Mr. E. E. Sharpe, who was acting as solicitor for the defendant. Before the execution of the agreement of sale (Ex. 2), Ex. 7 was submitted by the agents for execution by the defendant and this agreement or memorandum was objected to by Mr. Sharpe, who advised his client, the defendant, not to sign it on the ground that by admitting "having this day effected a sale" might make the defendant liable for the commission without the payment of the cash deposit which Mr. Bleasdale was not then prepared to pay and the execution of the document by Mr. Bleasdale provided for in the agreement. Mr. Sharpe then prepared and had signed by the defendant Ex. 3, which was given to the agents and which provides that "in the event of a sale being completed" the commission would be paid. By this the defendant and Mr. Sharpe state that it was distinctly understood that the cash payment must be made and the securities given according to the terms of the said agreement before the sale could be

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considered as completed and that this is the reason for the refusal to execute Ex. 7 and the substituting of Ex. 3. Further corroboration to the evidence of the defendant and Mr. Sharpe is the fact that the agent Doner admits the refusal on the part of the defendant to sign Ex. 7. Why, therefore, did Mr. Sharpe object to the execution by his client of Ex. 7 unless it was for the reason stated and the penciled memorandum made by Mr. Sharpe on the said exhibit seems to me to be the reasonable conclusion to arrive at. That memorandum reads as follows:

> This was not signed as it was not intended to pay a commission unless all documents executed by Bleasdale, such as Deed of U.S. land and completion of chattel mortgage, etc.,

and then this to my mind is corroborated by the witness Doner, who admits the refusal on the part of Mr. Sharpe to have his client execute that exhibit and his willingness to have Ex. 3 signed. There evidently was a distinction to be drawn between the words "having this day effected a sale," as in Ex. 7, and "in the event of a sale being completed" in Ex. 3, and the only reasonable conclusion that I can arrive at is that the object and intent of the change was to guard the vendor against the payment of the commission should the sale fall through by the non-payment of the deposit and the non-execution of the documents to be executed by the purchaser.

The day following the execution of the agreement of sale (Ex. 2), the purchaser Bleasdale called upon the defendant and stated that he did not intend to carry out his agreement, that he had repented of his action and that his house property in Chagrin Falls was subject to dower rights and that his wife would not consent to the sale. The defendant refused to release him as he claimed it was out of his hands and that he would be held for a commission if he did so.

Mr. Bleasdale had paid $100 prior to the execution of the agreement and had given a cheque for $400 payment of which was stopped, so that all the moneys defendant has received in connection with this sale is the sum of $100 and nothing further has been done by Mr. Bleasdale towards the carrying out of his part of the agreement of sale. Under these circum-

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MACDONALD J.

stances it seems to me impossible that the plaintiff should succeed in her claim for commission on this transaction.

Counsel for the plaintiff strenuously urged that the agreement (Ex. 3) is conclusive and cannot be explained or varied and that under it the plaintiff is entitled to succeed; he objects to parol evidence being admitted explaining the meaning of the words in the said exhibit "in the event of sale being completed" and he cites a number of cases in support of his contention.

Haffner v. Cordingly, 18 Man. R. 1, 8 W.L.R. 743, is a very similar case. There the agreement was, "on completion of the sale I will pay your firm a commission of $2,000." The vendor afterwards took back the land retaining the moneys and released the purchaser from further liabilities. The defendant resisted an action for $2,000 on the ground that the sale had not been completed within the meaning of the letter. Held, that, interpreting the letter in the sense in which the parties intended the words to be understood at the time, as gathered from the document itself and the surrounding circumstances and the defendant's promise to pay, what the parties meant by the words "completion of sale" and "completion of the deal" was the execution of a binding agreement of sale, and the plaintiffs were entitled to recover. Parol evidence was admitted to show what the parties intended when using the above terms.

In *Lott v. Outhwaite,* 1 T.L.R. 76, an agreement was entered into for the purchase of the property, the purchase-price to be paid as follows: £925 as a deposit and the residue on the completion of the purchase. The purchase was to be completed on January 1, 1887. The agents were to be paid their commission on completion of the purchase and completion of the purchase was considered as meaning payment of the purchase-price.

Viewing the circumstances indicated in this case I think it most reasonable that "in the event of sale being completed" was intended to mean by all parties not only the execution of the agreement of sale but the payment of the cash deposit and the execution by the purchaser of the documents referred to

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MACDONALD J.

in the agreement of sale and I furthermore find that as a matter of fact that was the understanding between all the parties concerned at the time of the execution of Ex. 3.

In the alternative claim the plaintiff alleges that a sale of the same property was made to one Barker and the evidence leads me to the conclusion that the intention was that all parties concerned would consider the sale to Mr. Bleasdale as of no further consideration; that the agents were to continue their efforts to make a sale of the property and they claim to have made such sale to one Barker. Barker and the vendor, the defendant, were brought together by the agents. They called upon Mr. Sharpe, the defendant's solicitor, and in view of the difficulty that they had experienced in their negotiations for sale to Bleasdale, it is reasonable to conclude that proper precautions would have been taken to guard against similar trouble on the negotiations with Mr. Barker. Mr. Barker's financial condition was not such as would justify the purchase of so expensive a property and Mr. Sharpe advised against the execution of an agreement of sale but suggested giving Mr. Barker an option to purchase and an option was executed. The question of commission was then debated and it was distinctly understood that a $1,000 commission would be paid in the event of the option being exercised by the purchaser and one-third of each instalment of $1,000 to be paid to the agents upon payment by Barker of each $1,000 instalment until their commission was paid in full.

$1,000 only was paid by Barker. He defaulted in making any further payments. The agents were paid the one-third of this $1,000. The option with Barker was abandoned by him as he was unable to carry out the purchase of the property.

The plaintiff is to my mind certainly not entitled to recover on this portion of his claim, nor is he entitled to recover for commission on the negotiations with Bleasdale. The action must, therefore, be dismissed with costs.

The plaintiff appealed.

W. S. Morrissey, for plaintiff, appellant.
D. A. Stacpoole, for defendant, respondent.

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PERDUE, C.J.M. and CAMERON, J.A. concur with Fullerton, J.A.

HAGGART, J.A.

HAGGART, J.A.—This is an action brought by the plaintiff for a commission earned in effecting a sale of the defendant's land, lots 17, 18 and 19 in the parish of St. Norbert and certain live stock and chattels, and during the negotiations it was agreed that in consideration of the procuring of a purchaser at a price and on terms satisfactory to the defendant, the defendant should pay $1,000 as a commission which was a sum less than the regular or usual amount for such service.

The terms of the alleged sale were reduced to writing and consist of two documents, one written by the defendant, dated September 5, 1917, addressed to the Dominion Farm Exchange and Doughie, Jack & Lyons, the sub-agents of the plaintiff, which is in these words:

> This is to say that in the event of a sale being completed by me to C. Bleasdale, of my farm and chattels, at St. Adolphe, lots 17, 18 and 19, St. Norbert, I agree to pay you a cash commission of one thousand dollars, this is to be accepted by you in full.
>
> Yours truly,
>
> [Sgd.] Elmer P. Loose.

and upon the same date there is drawn up a formal agreement between the defendant of the one part, as vendor, and the said Bleasdale, as purchaser, providing for the sale of the said property, containing all the details of the purchase, which is signed and sealed by the defendant and one Calvert Bleasdale, the purchaser. On the delivery of that document the plaintiff had earned the commission of $1,000, and there was nothing done by which the defendant was released from his obligation to pay that sum.

There was a good deal of evidence given on the trial as to what was meant by a completed sale and as to what took place subsequently in the negotiations with one Barker. This evidence was improperly admitted. The writings are there to speak for themselves and there is nothing to show that the defendant was released from his obligation to pay the moneys earned by the persons who acted as agents for the vendor. The foregoing facts dispose of the whole matter. I think the trial Judge should have refused to receive the evidence properly

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FULLERTON, J.A.

objected to and should have entered a verdict for the plaintiff for $1,000, the sum claimed.

FULLERTON, J.A.—The plaintiff alleges that a considerable time prior to September 5, 1917, the defendant listed with her and with Doughie, Jack & Lyons, real-estate agents, his farm in order that the plaintiff and the said Doughie, Jack & Lyons should obtain for him a purchaser for the said property and agreed to pay a commission in case they or any of them should obtain a purchaser, that plaintiff and said Doughie, Jack & Lyons obtained a purchaser for the said property in the person of one C. Bleasdale, who was acceptable to the defendant, and who was ready, willing and able to purchase said property, at a price and on terms satisfactory to the defendant and in consideration for procuring said purchaser the defendant agreed to pay to the plaintiff the sum of $1,000 and that subsequently Bleasdale entered into a binding agreement under his hand and seal to purchase the said farm from the defendant. There is also the allegation that Doughie, Jack & Lyons had duly assigned to the plaintiff all their claim for commission against the defendant.

The defence denies every material allegation in the statement of claim and in par. 6 sets up the defence relied upon at the trial. Par. 6 reads as follows:

> In the alternative the defendant repeats paragraphs two, three, four and five hereof, and says that if any agreement as to commission was signed by the defendant, [which by the way is not alleged] it was signed after an agreement or arrangement was made with the said Bleasdale, and after the defendant had informed the said Doughie of the terms and conditions under which he would make a sale to the said Bleasdale and after the defendant had explained to the said Doughie what he, the defendant, meant by "a completed sale," and the defendant says that a sale was never completed to the said Bleasdale of the said farm * *, the said Bleasdale not having made the cash payment, nor conveyed certain properties which were to be conveyed to the defendant, nor executed securities on certain chattels, all of which the said Bleasdale was to perform before a sale to him was completed in the terms of the said agreement, referred to in paragraph 4 of the plaintiff's statement of claim.

The facts briefly are that the plaintiff received a letter from the defendant, dated August 20, 1917, containing a full description of his farm. About September 1, 1917, Bleasdale came to plaintiff's office looking for a farm. Plaintiff's man-

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ager, George F. Doner, at that time could not think of a property that would suit him; he, however, saw Doughie of Doughie, Jack & Lyons, who suggested the property of the defendant. Doughie, Bleasdale and Doner drove out to the property, saw defendant, looked over the property, discussed the terms of a sale and settled them. The question of commission was also discussed. The defendant urged that as the cash payment was small, he could not afford to pay full commission, which would have been over $2,000. It was finally agreed that the commission payable to the agent should be $1,000. This arrangement of terms and commission was effected on Tuesday, September 4. All four men then returned to Winnipeg. About five o'clock the same evening Bleasdale paid the defendant a deposit on the land of $100. On September 5, a formal agreement for sale of the property to Bleasdale was executed. By this agreement

in consideration of the sum of $500 now paid by the purchaser to the vendor, the said parties hereto covenant and agree as follows:

1. The vendor agrees to exchange with and sell to the purchaser the following land [describing it. The price fixed is $41,000,] payable to the vendor as follows: $1,000 in cash on production by the vendor of formal writings conveying the above described property to the purchaser or his nominees; $9,000, by the purchaser assuming and agreeing to pay a certain mortgage for that amount now registered against the above described property in favour of The Federal Life Assurance Company of Canada and bearing interest at the rate of 7½%. The purchaser agrees to pay the vendor six per cent per annum on all deferred payments. The purchaser hereby agrees to pay and vendor hereby agrees to accept $3,500 of the above purchase price by transfer or assignment of the equity of redemption in those certain properties hereinafter described in paragraph four hereof, and to pay the balance of the purchase price at Winnipeg as follows:

by deferred payments extending from 1918 to 1922.

Bleasdale gave the defendant a cheque for $400, the balance of the cash payment drawn on the Chagrin Falls Banking Company of Chagrin Falls, Ohio.

Early the following morning Bleasdale saw the defendant and asked to be released from the agreement on the ground that his wife positively refused to leave her home in Ohio and live here on a farm. Defendant said the matter was out of his hands, that if he were to release him he would become liable for the commission.

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The cheque was put through for collection, but in the meantime Bleasdale stopped payment of it. So far as the evidence shows no attempt whatever has ever been made to enforce the agreement, nor is there anything to show that Bleasdale was not able to carry out his part of the agreement.

If there were no other facts in the case the plaintiff would clearly, under the authorities, be entitled to recover.

On the trial the defendant sought to establish that subsequent to the execution of the agreement for sale, an agreement in writing was entered into between the plaintiff and the defendant that plaintiff was only to be paid the commission on the "completion of the sale" and he urges that the words "completion of the sale" mean the carrying out of the conditions of the agreement of sale as to Bleasdale paying the $400, transferring to the defendant the property at Chagrin Falls and giving the mortgage on the farm to secure the balance of the purchase-money.

No such defence is raised by the pleadings. Par. 6 of the defence quoted above raises no such defence. Apparently, however, the trial was conducted on the assumption that such a defence was raised by par. 6, and we should deal with the case on that basis.

Mr. Sharpe, who acted for the defendant in closing out the sale, was called by the defendant. He said that on September 5, 1917, and before the agreement for sale was signed, Mr. Doughie handed him a letter and desired him to have it signed by the defendant. The letter is marked Ex. 7 on the trial and is in the following words:

Winnipeg, Sept. 5th, 1917

Messrs. Dominion Farm Exchange &
Doughie, Jack & Lyons,
Somerset Building,
Winnipeg, Man.

Dear Sirs:

This is to say that in consideration of your having this day affected a sale of my farm in the Municipality of Richot to Mr. C. Bleasdale, of the Town of Chagrin Falls, in the State of Ohio. I hereby agree to pay you a cash commission of one thousand dollars.

Yours truly,

Mr. Sharpe says he took exception to the words, "In consideration of your having this day affected [meaning effected]

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a sale," and said that they had not effected a sale, and would not have effected a sale until they had paid the full cash payment, had the American property transferred to Mr. Loose, giving the security that he had bargained for, consisting of a chattel mortgage and other securities. Mr. Sharpe says:

I altered their form myself, dictated it in their presence, and they acquiesced in the change that I made in it,—"upon the completion of the sale" and I explained why I changed it to after giving the security, the cash payment, as part of the cash consideration and—I altered the agreement accordingly to Exhibit No. 3.

Ex. 3 reads as follows:

Winnipeg, Manitoba, Sept. 5th, 1917

Messrs. Dominion Farm Exchange &
Doughie, Jack & Lyons,
Somerset Building,
Winnipeg, Manitoba.

Dear Sirs:

This is to say that in the event of a sale being completed by me to C. Bleasdale, of my farm and chattels, at St. Adolphe, Lots 17, 18 and 19, St. Norbert, I agree to pay you a cash commission of one thousand dollars, this is to be accepted by you in full.

Yours truly,
[Sgd.] Elmer P. Loose.

The defendant contended that this letter, which he says was acquiesced in by the plaintiff, constituted the contract between himself and the plaintiff with regard to the payment of commission. Mr. Sharpe himself says that whatever was arranged that day with regard to commission was reduced to writing in Ex. 3.

Assuming that this document constitutes an agreement, then all oral evidence of the negotiations leading up to the making of this agreement, including the draft letter (Ex. 7) were improperly admitted in evidence: *Inglis v. Buttery*, 3 App. Cas. 552. The learned trial Judge allowed the evidence to be given and stated that he would rule on its admissibility later on. He evidently decided that it was admissible since he makes it very largely the basis of his judgment.

The evidence does not establish that the terms of the letter (Ex. 3) were ever assented to by the plaintiff. Mr. Sharpe says: "They acquiesced in it," but on cross-examination he was asked: "What did they say? A. I don't remember

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what they said." Such evidence standing alone would not support a finding of acquiescence.

Doughie says he never saw that letter and Doner says there was no discussion in regard to it.

In any event, even if such assent were proved, the agreement would be ineffective since it is supported by no consideration. If Ex. 3 be regarded, as I think it should be regarded, not as an agreement at all but merely a letter written by defendant to plaintiff after the execution of the agreement for sale, and viewing it in that light it of course follows that the conversations sworn to by Mr. Sharpe in reference to the commission would be admissible, I fail to see how it can affect the plaintiff's right to commission which she had earned when she produced a purchaser, ready, willing and able to purchase the property.

Counsel for the defendant argued that by reason of events which subsequently occurred, the defendant was released, but as there is no defence of release on the record I do not consider this contention.

I would allow the appeal and direct that judgment be entered in favour of the plaintiff for $1,000 with costs here and below.

DENNISTOUN, J.A. concurs with Fullerton, J.A.

Appeal allowed with costs.

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COURT OF APPEAL

TKACZUK ET AL v. STEWART

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Master and Servant—Husband and Wife—Assignment of Wages to Be Earned in Future without Wife's Consent—Assignment of Wages Act, Man., S. 3—Assignment Ineffective Though Proceedings Not Taken Against It.

Courts—County Court Jurisdiction—Rescission of Agreement—Absence of Fraud or Misrepresentation.

A provision in an agreement for purchase of land by an employee from his employer that $500 is to be paid "out of the wages of the purchaser to be earned by him in the employ of the vendor during the season of 1918, which amount the vendor is hereby authorized to deduct from said wages," is tantamount to an assignment of, or order for, the payment of wages to be earned in the future, so far as it deals with wages yet to be earned, and, to that extent, if made by a married man living with his wife is invalid without the wife's consent under sec. 3 of *The Assignments of Wages Act*, R.S.M., ch. 13. The Court should treat such assignment or order as inoperative without proceedings having to be taken to set it aside.

The Court held that such an assignment was valid as to wages previously earned and that in a County Court action for the wages evidence that such agreement as a whole had been rescinded was properly rejected; there being no question of fraud or misrepresentation.

ARGUED: 15th March, 1920.
DECIDED: 6th April, 1920.

Statement. APPEAL by plaintiffs from the dismissal of their action for wages. Appeal allowed with costs.

R. A. Bruce, K.C., for plaintiffs, appellants.
A. E. Hoskin, K.C., for defendant, respondent.

April 6, 1920.

The judgment of the Court was delivered by

CAMERON, J.A.—This is an action for wages in the County Court brought by the plaintiffs, husband and wife, in which the County Court Judge entered a nonsuit.

The contract of employment, dated April 18, 1918, appears to be a contract made by the husband for himself and as agent for his wife, who subsequently adopted it. The two were to receive $85 per month, of which the wife was to get $30. The husband did not purport to deal with her share of the wages

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in an agreement for the purchase of certain lands made July 8, 1918, by him with the defendant. The wife says the defendant told her she was to get $30 a month (p. 20) and that she told him she would have nothing to do with the agreement to which she was never a party.

Sec. 3 of ch. 13, R.S.M., 1913 [*The Assignments of Wages Act*] provides:

3. No assignment of, or order for, wages or salary to be earned in the future shall be valid when made by a married man living with his wife, unless the written consent of his wife to the making of such assignment or order is attached thereto or endorsed thereon.

The agreement for purchase provides that $500 is to be paid to the defendant in November, 1918,

out of the wages of the purchaser to be earned by him in the employ of the vendor during the season of 1918, which amount the vendor is hereby authorized to deduct from said wages.

The other payments are to be made out of the crop in the manner set forth.

I am of opinion that this provision as to application of wages is tantamount to an assignment of, or order for, the payment of wages to be earned in the future, so far as it deals with wages yet to be earned. The defendant appears in the transaction in two different capacities—as master and as vendor. As master he secures a transfer to himself as vendor from the husband of wages earned and to be earned by him, the husband.

It was contended that this provision in so far as it deals with wages to be earned must be held as voidable only and must stand until set aside in an action brought for that purpose. The object of the Legislature was to afford protection against improvidence on the part of wage-earners and the Courts ought to assist in carrying out that intention whenever the subject-matter is brought to their attention by holding any assignment or order in violation of the statute as inoperative. Proceedings to recover wages are usually intended to be summary and as informal as possible and there was no intention on the part of the Legislature that an action must be brought to set aside an assignment of, or order for, wages before proceedings could be taken to recover them. See *Labatt's Mas-*

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ter and Servant, p. 1855, note. In *Central Ry. Co. v. Dover*, 57 S.E. 1002, 1 Ga. App. 240, a statute declaring void a contract for the assignment of unearned wages for the purpose of securing a loan was held to render the contract there in question invalid. The Canadian statute, 9 Edw. VII, ch. 2, referred to in the note in *Labatt, supra*, is our Manitoba Act. I think this is the construction put in England on the Acts respecting seamen's wages. *Merchant Shipping Act*, 1894, ch. 60, sec. 155.

On the facts in this case, the assignment by the husband of his wages to be earned after the date of the agreement, being made without his wife's consent, was void and we must so treat it.

The County Court has jurisdiction under ch. 44, R.S.M., 1913 [*The County Courts Act*] sec. 57 (*b*) in all actions for legal and equitable claims where the balance payable does not exceed $500 and

> in any such action the judge shall have all the powers and jurisdiction which a judge of the Court of King's Bench would have in case the action had been brought in that court, including the taking of accounts and the cancellation of contracts on the ground of fraud or misrepresentation, whether at the suit of the plaintiff or when claimed by the defendant in his dispute note, to the end and intent that full relief, legal and equitable, may be given to either party in such action.

Now the agreement for purchase was properly proved. We are entitled to disregard that part of it dealing with the wages of the husband to be earned but the rest of the instrument including that portion of it affecting wages earned by the husband up to its date remains unaffected. It was contended that the agreement as a whole had been rescinded and that evidence to that effect ought to have been admitted at the trial. But there is here no question of fraud or misrepresentation affecting the agreement. It is not alleged by the plaintiffs in their pleadings that the contract was rescinded and indeed there is no provision for a reply in the County Court but it was so stated before us. It is clear that the County Court Judge had no jurisdiction to entertain an action or counterclaim to set aside the agreement on any other grounds than those of fraud or misrepresentation, which were not urged.

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Under sec. 125 of *The County Courts Act*, the plaintiffs might have applied for a transfer of the action to the King's Bench, but no such application was made. What evidence could be offered to show cancellation does not clearly appear. It is evident, however, from what was stated on the argument before us by plaintiffs' counsel that he was relying upon cancellation or abandonment of the agreement by the action of the parties and not upon fraud or misrepresentation, and in that view the trial Judge was justified in refusing to admit the evidence. If he had been asked to transfer the case to the King's Bench he had jurisdiction to do so. But, as I have stated, no such application was made to him by the plaintiffs and he proceeded to deal with the agreement so far as it was properly before him. That is, he took the agreement for purchase as proved and establishing a *prima-facie* claim for $500 due the defendant by the husband, which he (the husband) says he never paid. I think the County Court Judge was, however, in error in holding that agreement covered the amount due to the husband after the date of the agreement and the amount due to the wife.

My conclusion is that the plaintiffs are entitled to recover, as to the husband, the amount earned by him subsequent to the agreement, and, as to the wife, the whole amount due her.

The judgment of nonsuit is set aside and a judgment for the plaintiffs entered in accordance with the foregoing.

The plaintiffs are to have their costs of this appeal and of the trial in the County Court.

The amount for which judgment should be entered:

Due to the wife, 5½ months	$165.
Due to the husband, 2 2/3 months	146.
	$311.
Deduct amount paid as in particulars	41.33
	$269.67

Appeal allowed with costs.

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CHAMBERS

B. v. B.

Before MACDONALD, J.

Pleading—Divorce Action—Particulars.

In an action for divorce respondent alleged against petitioner adultery, condonation of or connivance at respondent's alleged adultery, abuse, assault, use of vile language, etc. Co-respondent alleged against petitioner condonation of and connivance at respondent's alleged adultery. The respondent and co-respondent were ordered to give particulars of their allegations, including, where it was alleged the acts were done before others, the names of such other persons.

ARGUED: 19th January, 1920.
DECIDED: 23rd January, 1920.

Statement. MOTION on behalf of the petitioner for particulars of certain general allegations contained in the respondent's and co-respondent's respective answers to the petition filed herein.

H. E. Swift, for petitioner.

M. G. Macneil, for respondent.

MACDONALD, J.—The respondent says: (1) That on divers dates the petitioner committed adultery with persons unknown to the respondent and contracted a loathsome venereal disease which he communicated to the respondent and from which she suffered great physical and mental torture; (2) That the petitioner has condoned or connived at the adultery, if any, of the respondent; (3) That the petitioner has been guilty of great cruelty to the respondent in this, that he abused and assaulted the respondent and used vile language to her in the presence and hearing of her children and of the relatives of both parties; and in many other ways, by his temper and actions, he caused the respondent to be in constant fear of him.

The petitioner demands: (1) Particulars of the dates when, places where, and persons with whom the petitioner is alleged to have committed adultery; (2) Particulars of the acts, matters, and things, whereby the petitioner condoned or connived at the adultery of respondent and particulars of dates when, places where, such acts, matters and things took place; (3) Particulars of dates when, places where, and persons in whose presence and hearing petitioner abused respondent; (4) Particulars of dates when, places where, and persons in whose

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presence and hearing petitioner assaulted the respondent; (5) Particulars of dates when, places where, and the names of persons in whose presence and hearing the petitioner used vile language to the respondent; (6) Particulars of the other ways in which the petitioner caused the respondent to be in constant fear of him and particulars of the dates when, and the places where, the acts, matters and things constituting such other ways occurred.

From the co-respondent the petitioner demands the following particulars: (1) Particulars of acts, matters, and things, whereby the petitioner condoned the acts of adultery, and particulars of the dates when and places where such acts, matters, and things took place; (2) Particulars of the acts, matters and things, whereby the petitioner connived at the adultery and particulars of dates when and places where such acts, matters and things took place.

In *Bishop v. Bishop* [1901] P. 325, 70 L.J.P. 93, it is held that if the alleged acts charged took place in the presence of certain persons described, the names of such persons may be ordered to be disclosed, thus following the ecclesiastical law and common-law practice.

Following this case, the demands made for the names of persons alleged in the respondent's answer must be given. Furthermore, the allegations are too general and therefore so vague that they cannot be properly met and I think that the respondent and co-respondent should comply with the demands of the petitioner to give all possible particulars as required and the best they can extract from the different witnesses upon whom they rely to prove their case. *Hartopp v. Hartopp,* 71 L.J.P. 78, 87 L.T. 188.

I do order accordingly.

Order accordingly.

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PENNY v. FULLJAMES

Before MATHERS, C.J.K.B.

Fraudulent Conveyances—13 Eliz., Ch. 5, S. 2—Sale by Company to Directors—Pending Action against Company for Tort—Good Consideration—Intent to Prefer—Fraudulent Intent—When Statute Operates.

13 Eliz., ch. 5, sec. 2, being for the protection of "creditors and others" against fraudulent conveyances by debtors, protects a person who at the time of the conveyance complained of had a claim for unliquidated damages in respect of which judgment had not then been recovered.

The fact that there was a good consideration for the conveyance is not conclusive in its favour but throws a much heavier onus on those asserting that it was made with intent to delay or defraud.

A debtor may convey his property so as to prefer some of his creditors over others without coming within said statute. The fact that a sale was made for the express purpose of defeating an expected execution is not sufficient to make it void under said statute, if the sale was *bona fide* and for a fair consideration.

But where certain directors, being in control of a company, caused it to sell its assets to themselves in consideration of their assuming certain of its liabilities a large part of which were owing to themselves or for which they were personally liable, the intention being, as the Court found, to turn the business over to them as a going concern, not for the benefit of any of the company's creditors, but for the purpose of defeating a plaintiff in a pending action against the company for tort, the sale was held void under said statute. The fraudulent intent of said directors was through them to be attributed to the company.

The fact, as contended, that the company might have made an assignment under *The Assignments Act* before the plaintiff got judgment and thereby effectually prevented him (as having only a claim for damages) from ranking as a creditor, might be a circumstance to be considered in determining the intent with which the sale was made, but nothing more.

Statement. ARGUED: 11th December, 1919.
DECIDED: 8th January, 1920.

INTERPLEADER ISSUE between the plaintiff on whose behalf certain goods were seized under an execution against the Kensington Cafe Ltd., and the defendants who claimed ownership of said goods by purchase from the company but which transaction was impeached by the plaintiff. Judgment for plaintiff with costs.

W. S. Morrisey, for plaintiff.
F. M. Burbidge, K.C., for claimants.

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MATHERS, C.J.K.B.

MATHERS, C.J.K.B.—This is a sheriff's interpleader issue in which the execution creditor is plaintiff and the claimants are defendants.

On January 23, 1919, the plaintiff recovered a judgment against the Kensington Cafe, Ltd. for $2,500 damage for personal injuries due to the company's negligence. An execution was issued upon this judgment on January 28, and on April 9, the sheriff seized.

The defendants claim to have purchased the goods seized from the Kensington Cafe on January 18. A bill of sale from the company to them bearing that date was registered on January 28.

The sale alleged by the defendants is impeached on several grounds: (1) The plaintiff says that it was not a real but a pretended sale; (2) That there was no immediate delivery followed by an actual and continued change of possession, so as to make the sale valid without a bill of sale, and that the bill of sale is void because of non-compliance with *The Bills of Sale and Chattel Mortgage Act,* R.S.M., 1913, ch. 17; (3) That it is fraudulent and void both under the Statute of Elizabeth and *The Assignments Act,* R.S.M., 1913, ch. 12; (4) That it is void because it does not comply with *The Bulk Sales Act,* R.S.M., 1913, ch. 23.

In the view I take of the case it will not be necessary to discuss any of these several Acts with the exception of the Statute 13 Eliz.

By ch. 5, sec. 2, of that Statute, every gift, grant, alienation or conveyance of goods or chattels made with intent to delay, hinder or defraud "creditors and others of their just and lawful actions, suits, debts, accounts and damages," &c., is as against the person delayed, hindered or defrauded "utterly void, frustrate and of none effect." Sec. 6 excepts sales and conveyances "upon good consideration" to a person not having notice or knowledge of the fraud.

It will be observed that this statute is not alone for the protection of creditors but of "creditors and others." It therefore protects the person who at the time of the conveyance

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complained of had a claim for unliquidated damages in respect of which judgment had not then been recovered. *May's Fraudulent Conveyances,* 102, *Barling v. Bishopp,* 29 Beav. 417 (54 E.R. 689). That was an action for damages for trespass. The action was at issue and notice of trial had been given but a few days before the trial at which judgment was recovered a voluntary conveyance was made by the defendant. This conveyance was held to be within the statute and was declared void at the suit of the plaintiff after judgment recovered in the damage action.

Then we have *Crossley v. Elworthy,* L.R. 12 Eq. 158, 40 L.J. Ch. 480, where the plaintiff's claim consisted in a judgment for damages for false representation as to the solvency of a company. The action in which judgment was recovered was not commenced for about a year after the settlement complained of had been made and yet it was held void under the statute as against the judgment creditor.

In all these cases the plaintiff had recovered a judgment before taking proceedings under the statute. The Court of Appeal in Ontario, in a very recent decision, *Hopkinson v. Westerman,* (1919) 45 O.L.R. 208, 16 O.W.N. 5, has gone farther and held a person who has a right of action for a tort, though no judgment had been recovered thereon, is entitled to maintain an action under the statute.

The above cases all relate to voluntary conveyances but where there is a valuable consideration the case is much more difficult to make out. The effect of there being a good consideration is discussed by Fry, J. in *Golden v. Gillam, In re Johnson,* 2 Ch. D. 389, at p. 393, 51 L.J. Ch. 154. He there says:

> The effect on a deed of this sort of its being for good consideration is very great. It does not necessarily show that the deed may not be void under the statute, because it many cases good consideration has been proved, and yet the object of the deed has been to defeat and delay creditors; such has been, therefore, for an unconscientious purpose, and the fact that there has been good consideration will not uphold the fact. But nevertheless it is a material ingredient in considering the case, and for very obvious reasons; the fact that there is valuable consideration shows at once that there may be purposes in the transaction other than

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the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult.

Similar language was used by Lord Justice Turner in *Harmon v. Richards,* 10 Hare 81, at p. 89, 22 L.J. Ch. 1066. The fact that there was a good consideration is not therefore conclusive in favour of the deed but it throws a much heavier onus upon those who assert that it was made with an intent to delay or defraud creditors.

There is no doubt also that a debtor may, notwithstanding the Statute of Elizabeth, prefer some of his creditors over others. That is to say, he may lawfully convey his property to one creditor for the *bona-fide* purpose of paying him what he owes and such a conveyance is not void either at common law or under the statute merely because he thereby intended to defeat an expected execution. It was so held in *Wood v. Dixie,* 7 Q.B. 892, 9 Jur. 796, followed in *Darvill v. Terry,* 6 H. & N. 807, 30 L.J. Ex. 355, and *Mulcahy v. Archibald,* 28 S.C.R. 523.

Now what were the facts leading up to the impeached transaction? The Kensington Cafe Company Ltd. was incorporated in 1916, by F. Nesti, A. E. Fulljames and F. Restivo, the intention being that $10,000 should be put in by each. Later on the amount of capital to be contributed by each was placed at $12,500. Nesti and Fulljames each paid in the amount named but Restivo was unable to raise his share. When the company was organized F. Nesti was appointed president and Fulljames secretary-treasurer and they continued throughout to be executive officers of the company. It took over a lease of the building known as the Kensington Block on the corner of Smith Street and Portage Avenue. The front part of the ground floor was leased to a man named Gramms to be used as a fruit store and in the rear of that floor the company conducted a restaurant.

In connection with this business they also occupied a portion of the second floor. All other parts of the building were sublet to various tenants. The company paid a large premium for this lease which became a total loss. At first business was fair on account of the number of soldiers in the city but as

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they departed overseas business fell off and in 1918 the company was in financial straits. Wholesale houses refused to supply goods unless payment was guaranteed by Nesti or Fulljames and by the end of 1918 nearly all the large creditors were guaranteed in this way.

From time to time Nesti and Fulljames supplied additional capital. Beginning with August, 1918, various attempts were made to sell the business but without success. After the signing of the armistice in November, 1918, business began to improve and improvement was steady until the time of the sale now attacked.

On December 31, 1918, the liabilities of the company amounted to $31,906 but as against that there was $4,226 cash in the bank. The $31,906 was made up of $8,880 due to Nesti Bros. and $8,880 borrowed by Fulljames from a Mrs. McNeil and loaned to the company, $2,376 wages and $11,768 to trade creditors. It did not include a large claim due to the landlord for arrears of rent nor did it include the plaintiff's claim.

The plaintiff had brought an action for damages against the company and the trial was fixed for January 23, 1919. The company, through its solicitors, had made various unsuccessful attempts to settle with the plaintiff.

On January 18, five days before the date fixed for the trial, a meeting of directors was called at the office of the company's solicitors. The only directors present were Fulljames and Nesti. F. Restivo though notified did not attend. At this meeting Fulljames read a statement purporting to show the liabilities of the company as of December 31, 1918. The statement included only the items above mentioned aggregating $31,906. As recorded in the minutes he

> further pointed that in addition to the above definite liabilities there was a large liability of the Company under the lease of the Kensington Building on which a very considerable sum was now overdue, owing and unpaid,

and

> that the physical assets of the restaurant business carried on by the Company, calculated at cost price with a fair amount deducted for depreci-

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tion, was approximately the sum of $15,000 and that there was $4,226 in hand at the end of 1918.

He then made an offer on behalf of himself and Nesti to purchase from the company the restaurant business as a going concern as of January 1, 1919, and all the physical assets of the company used in the restaurant business and including the cash on hand, they to assume the liabilities set out, namely, $31,906, and to obtain a release from all the creditors whose liabilities they were to assume, the company to lease to them the portion of the buildings used in connection with the restaurant for the balance of the term of the lease for $1,400. It was then moved by Nesti and seconded by Fulljames that the offer be accepted. A by-law of the company to carry the agreement into effect was then passed by the same two directors for the sale to themselves in accordance with the offer made. On January 20, the receipts for the 17th and 18th were deposited to the credit of the company. On the 23rd an account was opened in the bank for Nesti and Fulljames and on that day the receipts for the 19th, 20th and 22nd were deposited to their credit. In all other respects the business continued as before. Fulljames and Nesti continued to manage as formerly. The name "The Kensington Cafe Ltd." was not changed, even the counter order forms bearing that name continued to be used. In fact there was nothing to afford the slightest inkling that any change in the ownership had taken place.

On January 23, the plaintiff recovered judgment against the company for $2,500 and costs by consent. On the 28th a bill of sale from the company to the purchasers, executed on behalf of the company by Nesti as president and Fulljames as secretary-treasurer, under the company's seal, was registered. The affidavits of execution and *bona fides* are sworn on January 24, the day after the judgment was recovered. On January 28, an execution was issued and on April 9, a seizure was made by the sheriff of the goods in the restaurant. Nesti and Fulljames claimed to be the owners of the goods seized and an issue was directed to try the question of the validity of their claim as against the plaintiff's execution.

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All the assets of the company were included in the sale to the defendants with the exception of the lease of the Kensington Block. It was admitted that this lease has no value, in fact, that it is a liability rather than an asset as the rent received is heavily in arrear and exceeds the revenue derived from subletting.

I have no doubt the sale was made for the express purpose of delaying or defeating the plaintiff but since it was for a good consideration, *Wood v. Dixie, supra,* and the cases which have followed it, show that is not enough in itself to avoid the transaction under the Statute of Elizabeth. These cases, however, go no further than showing that the mere intention of defeating one or more creditors is not enough. Before the statutes against fraudulent preferences a debtor might lawfully convey all his property to or for the benefit of one or more of his creditors to the total exclusion of others provided the sale or conveyance was *bona fide* and for a fair consideration. As the law permitted the debtor to do this the validity of the transaction was not affected by his motive or intention. It would not therefore be impeached as fraudulent although at the time he entertained the express design of paying some of his creditors and defeating the claims of others. In *Wood v. Dixie, supra,* Lord Denman, after pointing out "that a mere intention to defeat a particular creditor does not constitute fraud," adds, "We do not say that many other considerations may not exist," which would justify another conclusion. And Williams, J. said that it had long been settled that "the mere intention to defeat an execution creditor did not in itself constitute a fraud." It follows that if in this transaction there appeared to be nothing more than a mere intention to defeat the plaintiff's execution the sale would have to be allowed to stand but in the view which I take of the case there was a great deal more than that mere intention. Its purpose was also to benefit the defendants at the expense of the plaintiff.

The defendant Nesti, or at least the firm of Nesti Bros., of which he was a partner, were creditors to the extent of $8,880. The defendant Fulljames, as the representative of the McNeil estate, had put into the business $8,880 of the moneys of the

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estate. As to this amount Mrs. McNeil stands in the books as creditor but there can be little doubt about Fulljames' liability for this sum. The total liabilities assumed, after deducting the cash on hand, was $27,680 and of this $17,760 was made of the two sums above mentioned. The transfer was not as in *Wood v. Dixie*, *Darvill v. Terry*, and *Mulcahy v. Archibald*, *supra*, made to a creditor, nor did the defendants constitute themselves trustees for the creditors. They merely took over the business as a going concern and procured all the creditors with the exception of Penny and the landlord to accept them in lieu of the company. It seems to me it is a fair inference that the dominant motive of Nesti and Fulljames was to secure a benefit to themselves by cutting out the plaintiff. Does a sale though for good consideration made with such an intent constitute a fraud within the Statute of Elizabeth?

It is very clear that the company could not make such a sale to the defendants and retain any interest in the purchase for itself. Reserving such benefit would constitute a fraud as against a creditor who had been hindered or delayed by the transaction.

Is the position any different if the benefit is conferred upon the directors by whom the company is owned and controlled? Here the defendants controlled the company and could do what they liked with its property and assets. They might have made a conveyance to themselves as trustees for the creditors whose debts they assumed, in which case the law as stated in *Wood v. Dixie*, *supra*, would have applied. But they did not do that. They caused the company to sell all its assets of any value to themselves, without any other consideration than the assumption by them of some of the liabilities of the company, the greater part of which was owing to themselves or for which they were personally liable. The business was improving and might soon again become prosperous and they decided to take it into their own hands. If they delayed doing so it must inevitably become burdened with the judgment which it was anticipated the plaintiff must recover against the company in a few days. These I infer were the motives which actuated the defendants and through them the company.

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The company intended to do more than merely prefer its other creditors over the plaintiff and the landlord, it intended to turn over to the defendants the whole business as a going concern, not for the benefit of its creditors or any of them, but for the purpose of defeating the plaintiff.

The fraudulent intent was that of Nesti and Fulljames but is through them to be attributed to the company. The company was no doubt a distinct entity but it was so owned and controlled by the defendants that their knowledge and intention with respect to its property must be attributed to it. *In re Hirth, Ex parte Official Receiver* [1899] 1 Q.B. 612, at p. 625, 68 L.J.Q.B. 287, per Vaughan Williams, L.J.

It was argued that if the company had made an assignment under *The Assignments Act* before the plaintiff got judgment instead of selling to the defendants, the plaintiff would have been in even a worse position because having only a claim for damages he would not in that case have ranked as a creditor.

The fact that there was a method by which the company might have effectually defeated the plaintiff's claim without violating any law may be a circumstance to be considered in determining the intent with which the sale to the defendants was made, but it is nothing more. I am satisfied that that course was not pursued because of any tenderness for the plaintiff but that the plan was adopted which while disposing of the plaintiff would be most beneficial to the defendants.

For these reasons the sale to the defendants was void under the Statute of Elizabeth as against the plaintiff and must be set aside.

In view of this conclusion I have not found it necessary to consider the objections to the transactions founded on *The Bulk Sales Act, The Bills of Sale and Chattel Mortgage Act,* or *The Assignments Act.*

The plaintiff is entitled to the costs of the issue. Fiat for execution.

Judgment for plaintiff with costs.

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FOSTY V. PELAZOK

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Before MACDONALD, J.

Malicious Prosecution—Prosecution Instituted without Reasonable Effort to Ascertain Facts—Want of Reasonable and Probable Cause—Unreasonableness Leading to Inference of Malice.

Defendant was held liable for malicious prosecution for having laid a criminal information without reasonable effort to ascertain the facts and because the Court believed his object was more to recover his money than to prosecute in the interest of justice. The Court found a want of reasonable and probable cause and that the institution of the prosecution was so unreasonable as to lead to the inference of malice.

DECIDED: 17th December, 1919.

ACTION for malicious prosecution. Judgment for plaintiff with costs. Statement.

D. Forrester and *W. Thornburn,* for plaintiff.

L. D. Smith, for defendant.

MACDONALD, J.—The parties to this action were partners in the business of dealers in cattle and grain. Within a very short time after the date of the partnership the defendant became dissatisfied and asked for a dissolution to which the plaintiff agreed and they immediately repaired to the home of the plaintiff to effect a settlement of the partnership transactions.

The plaintiff made up a statement which showed a balance coming to the defendant of $803.40 and he gave him a cheque for that amount, in addition to which it was agreed that a carload of rye, purchased by the defendant during the term of their partnership and then on the way to Winnipeg, consigned to Messrs. Hallet & Carey, grain dealers, members of the Winnipeg Grain Exchange, should be given to the defendant and to be his sole property, and this carload of rye is the basis of trouble through which this action has arisen.

Shortly after the payment by the plaintiff to the defendant of the $803.40 referred to, the defendant made a demand upon the plaintiff of a further sum of $77 which he claimed is still due him, and he made a further demand of one half the profits of a carload of rye which had previously been disposed

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of. This claim the plaintiff repudiated and told the defendant, if he was not satisfied, he could seek redress in the Courts.

The defendant thereupon came to Winnipeg, as he states, "to prosecute for this balance," and then he received information about the carload of rye which led to all this trouble.

The defendant is an illiterate man and does not speak English. He knew the carload of rye had been shipped to Hallet & Carey and secured the services of William Thomas Maddaford, manager of the Ruthenian Elevator Co., Winnipeg, to go with him to Hallet & Carey's and ascertain the position of affairs with respect to the carload of rye, and what took place at this interview with Mr. Eggleston, the manager of Hallet & Carey Company, is important.

Mr. Maddaford says, "I asked about the car and told him I was there to find out if we could get it or possession of it. He said it was shipped by Fosty and he did not know the defendant in the matter. I asked him if he would hold the proceeds, as he told me the car was not sold, and he said he would not assure me that he would hold the proceeds I said I would garnishee and he said that would do no good as Fosty owed us more money than the car would cover. I knew Hallet & Carey still held the car. I repeated this information to Verley and he told the defendant."

Shortly after the shipment of this carload of rye, the plaintiff called upon Hallet & Carey and advised them, through Mr. Stewart, that this car of rye was not his and asked them to keep separate track of it. He did not however give the name of the owner. It had been shipped in his name as consignor, as had all previous consignments, to the knowledge and with the approval of the defendant.

Defendant then consulted a solicitor who advised him to go and see Fosty and, notwithstanding the fact that he lived in the same settlement as Fosty, he did not see him and admits that only once did he try to find him.

On June 20, 1919, the plaintiff was arrested on a warrant issued on information laid by the defendant and was taken to Winnipeg where he applied for and secured bail until

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June 27 when a preliminary investigation was held and the charge dismissed, and this action is brought, charging the defendant with malicious prosecution.

The evidence shows an absence of reasonable and probable cause to justify the proceedings taken by the defendant. He knew the carload of rye had not been disposed of when he interviewed Hallet & Carey with Mr. Maddaford. Maddaford says that he distinctly advised Mr. Verley to that effect and that Mr. Verley communicated those facts to the defendant. The defendant states that what Verley told him was, that Fosty had taken all the money on the car and that there was nothing left and that he believed this and on the strength of which he laid the information against the plaintiff. He says he laid the complaint in order that the man should be punished and that he should get his money.

This, however, is not what Mr. Maddaford told Mr. Verley, nor do I think that Mr. Verley told the defendant other than as informed by Maddaford. He also acted in an unreasonable manner in not interviewing the plaintiff before instituting his proceedings. Had he done so, this trouble would not have arisen. Knowing then that the car of rye had not been disposed of, it would have been an easy matter for him to have advised Messrs. Hallet & Carey that the rye was his and that they must account to him for it.

I also am led to believe that his object was more to recover his money from the plaintiff than a desire to prosecute in the interest of justice. There was, therefore, an absence of reasonable and probable cause and the action of the prosecutor in instituting this prosecution was so unreasonable as to lead to the inference that the prosecution could only have been the result of malice.

There shall be judgment for the plaintiff and I assess the damages at the sum of $500, and there will be judgment for the plaintiff for that amount together with costs.

Judgment for plaintiff with costs.

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HANEY V. ELMER ET AL.

Before MACDONALD, J.

Solicitors—Costs—Honest Settlement by Clients without Knowledge of Solicitors.

Parties to a suit may settle between themselves without the knowledge of their solicitors provided they do so honestly and without any intention of depriving the solicitors of their costs. The Court in such case will not interfere to protect the solicitor in respect of his costs.

ARGUED: 19th December, 1919.
DECIDED: 7th February, 1920.

Statement. MOTION for an order for costs. Motion dismissed.

F. Heap, for plaintiff.

H. N. Baker, for defendant.

MACDONALD, J.—This is a motion for an order that the costs of the defendant incurred in this action should be taxed and that the same should be paid by the plaintiff to the defendant's solicitor, the present applicant, forthwith, after taxation.

Counsel for the defendant relies upon the case of *Stewart v. Hall,* 17 Man. R. 653, 8 W.L.R. 479, and cases there cited.

It is claimed that the plaintiff made a settlement with the defendant unknown to the defendant's solicitor.

From the very bulky material which I have gone through in this application, I find that there was a possibility of a settlement between the parties and that the defendant's solicitor knew that fact.

The law seems well settled and the true test is, was the object of the arrangement to deprive the defendant's solicitor of his costs? *Brunsdon v. Allard,* 2 El. & El. 19, 28 L.J.Q.B. 306, per Wightman, J.; *Price v. Crouch,* 60 L.J.Q.B. 767, per Denman, J.

Parties to a suit may no doubt settle between themselves without the knowledge of the solicitors, provided they do so honestly and without any intention of cheating the solicitors of their costs. But the Court will interfere to protect a solicitor where it is clearly made out that there has been some collusion or fraudulent conspiracy between the parties to deprive him of his costs: In *re Margetson & Jones* [1897] 2 Ch. 314, 66 L.J. Ch. 619; *The "Hope,"* 8 P.D. 144, 52 L.J.P. 63; *Bellamy v. Connolly,* 15 P.R. 91.

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The case of *Stewart v. Hall, supra,* is not a parallel case. There the plaintiff and defendant settled without the knowledge of the plaintiff's solicitor, defendant paying the plaintiff a sum of money and it is quite evident from that case that the intention was to deprive the plaintiff's solicitor of his costs.

I cannot see from the vast material before me that Mr. Haney, the plaintiff in the action, could have entertained any such an intention. There was no settlement made between the parties which, to my mind, in any way affects the position of the defendant's solicitor. No moneys were paid by Mr. Haney in settlement, in fact, the defendant conceded the plaintiff's right to a judgment against him, and had the case proceeded and judgment been rendered in favour of the plaintiff, the defendant [defendant's solicitor?] would have no redress other than he has now. He still has his claim against the defendant for costs incurred.

It is true there is some doubt as to the validity of the settlement. The defendant made an affidavit intimating that he was imposed upon by the plaintiff. There is no evidence that the plaintiff took any part, directly or indirectly, in the preliminaries leading up to the settlement. Settlement was suggested and arranged by a third party who, it appears, was acting friendly towards the defendant. The plaintiff, however, now offers that the settlement should be set aside if the defendant so desires and the case proceeded with.

Under all the circumstances I cannot see that the defendant [defendant's solicitor?] is entitled to succeed in his motion and I therefore dismiss it.

Motion dismissed.

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IN RE STEWART ESTATE

Before CURRAN, J.

Will—Construction—Bequest to "The Most Needy and Deserving of Our Relatives."

A testator left his property to "my brothers, Thomas and Angus, to be divided among themselves and the most needy and deserving of our relatives." *Held* the words "the most needy and deserving of" should be eliminated as too vague and uncertain to be given effect to, and the word "relatives" should be restricted to those who would take in case of intestacy, in this case the testator's father, who with the said brothers Thomas and Angus should divide the estate equally between them.

DECIDED: 15th April, 1920.

Statement. APPLICATION by way of originating notice of motion for construction of a will.

J. Roy Colwill, for applicant Angus Stewart.
E. A. McPherson, K.C., as guardian *ad litem.*

CURRAN, J.—This matter comes before the Court by way of originating notice of motion under the King's Bench Rules, for an order construing the will of the deceased in respect of the matters raised by the two questions following: (1) Does all the estate of the said deceased go to his brothers Thomas and Angus? (2) If not, how are the members of the class described as the "most needy and deserving" to be ascertained, and what share would each devisee take?

The will in question is as follows:

Pine Creek, Jan. 24th, 1907

William Stewart, Pine Creek. In case of death I leave any property belonging to me to my brothers, Thomas and Angus, to be divided among themselves and the most needy and deserving of our relatives.

[Sgd.] William Stewart.

Witnesses: [Sgd.] Charles Stewart.
[Sgd.] Albert Stewart.

Administration with will annexed of the deceased's estate was granted by the Surrogate Court of the Central Judicial District to Angus Ferguson Stewart of Gladstone post-office in the province of Manitoba, on December 24, 1913. The administrator is a brother of the testator, and is the party who has launched this motion. The testator died a bachelor on or about September 15, 1913, leaving him surviving his father, a

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widower 83 years of age, who resided with the testator at the time of the latter's decease; a half-brother named Archibald Stewart, a bachelor, and full brothers Jamieson, Thomas, Charles H., Robert, Albert and the supplicant Angus Ferguson Stewart, and a full sister, Janet, wife of John N. Coulter of Handel in the province of Saskatchewan, and a half-sister Martha, wife of W. H. Downie of Kelfield, Saskatchewan. An elder brother of the deceased, John Stewart, predeceased him, leaving a widow and numerous children; both the sister and half-sister aforesaid have children now living. The material before me suggests the possibility that there was at the time of the testator's death a brother of the testator's father living in Ontario, and at the same time, a sister of the testator's mother also living in Ontario; both of these parties however are now dead, and no particulars of the date and place of their decease have been given.

By an order of this Court, bearing date March 27, 1920, the said Jamieson Stewart was appointed to represent all of the adult relatives, as well by marriage as by blood of the testator, as a class for the purpose of this application, and E. A. McPherson of the city of Portage la Prairie, barrister-at-law was appointed guardian *ad litem* of all the relatives of the testator who are infants. By the same order, service on the relatives as well by marriage as by blood, with the exception of service on the said Jamieson Stewart and the said E. A. McPherson, of the originating notice of motion, and any other proceedings had and taken thereunder, was dispensed with, and service on the said Jamieson Stewart and E. A. McPherson of the said notice of motion was made good and sufficient service upon and binding on all of such relatives. Counsel for the applicant and the guardian *ad litem* in person appeared on the hearing of the motion. No one appeared for Jamieson Stewart, or any of the other relatives of the testator. At the conclusion of the argument I reserved judgment, and having now considered the questions upon which the opinion of the Court is asked, I have reached the following conclusions:

I propose to deal with question No. 2 first, because it seems to me that the answer to that question will also answer question No. 1. The will makes no provision for any person who

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is to determine who of the class described as the "most needy and deserving of our relatives" are to participate. The Court might perhaps determine upon evidence who compose this class called "relatives," and which members of that class are the most needy, using that term to denote their financial circumstances, but I know of no means available to the Court to determine which members of that class are the most "deserving," This is a relative term, and in what sense the testator used it I cannot even conjecture, and the will itself fails to define or to express the testator's mind or intention upon the subject. It is to be noted that the provision is in the conjunctive "needy and deserving," both these states of being must concur and be present in those who are to participate. The result is that the Court cannot determine both of these questions, though it might the first, therefore the devise would fail for uncertainty unless it is open to the Court to disregard the descriptive words "most needy and deserving" and deal with it as a devise to relatives unnamed. There appears to be authority for this. See *Stroud*, p. 1701, where it is said that qualifying adjectives such as "poor," "poorest," "deserving" and "necessitous," are generally inoperative because too uncertain; and see also *Jarman on Wills*, p. 1634.

"A difficulty in construing the word *relations* sometimes arises from the testator having superadded a qualification of an indefinite nature; as where the gift is to the *most deserving* of his relations; or to his *poor or necessitous* relations. In the former case, the addition is disregarded, as being too uncertain; and the better opinion, according to the authorities is, that the word *poor* also is inoperative to vary the construction, though the cases are somewhat conflicting. * * * * In *Widmore v. Woodroffe*, Amb. 636 [a very old case, 1766] a testator bequeathed two-thirds of his property *to the most necessitous of his relations* by his father's and mother's side. * * * * * Lord Camden said the bequest would stand upon the word relations alone, *the word poor being added made no difference;* there was no distinguishing between the degrees of poverty."

Here the testator left a niece his sole next of kin according to the statute, and more remote relations; and it was argued for the latter that in consequence of the use of the word "necessitous" the gift ought *not* to be confined to those who were within the statute; but Lord Camden said several cases have been cited, all making the statute the rule, to prevent an inquiry, which would be infinite and would extend to relations

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ad infinitum. This case seems to be directly in point for the present inquiry, for there, there was only one relation within the Statute, (as here, viz., the father of the testator) and consequently the only point decided was that the addition of the word "necessitous" did not make the relations include those beyond the Statute. It was said, see p. 1635, this case is no authority for the proposition that if there are several statutory next of kin a gift to "poor relations" will necessarily include those of them who are in affluent circumstances. The expression "relatives" and "relations" has been judicially defined and held to embrace and include *only* those who could take as next of kin under the Statutes of distribution, as in case of intestacy, *Jarman on Wills,* 6th ed., pp. 1627 and 1628. I quote from this authority the following:

"The word *relations* taken in its widest extent, embraces an almost illimitable range of objects; for it comprehends persons of every degree of consanguinity, however remote, and hence, unless some line were drawn, the effect would be, that every such gift would be void for uncertainty. In order to avoid this consequence, recourse is had to the Statutes of Distribution; and it has long been settled, that a bequest to *relations* applies to the person or persons who would, by virtue of those statutes, take the personal estate under an intestacy, either as next of kin, or by representation of next of kin."

It appears from the same authority that this construction also applies to devisees of real estate. I refer also to the following authorities. *Stroud's Judicial Dictionary,* 2nd ed., p. 1700; *Fielden v. Ashworth,* L.R. 20 Eq. 410; *Ross v. Ross,* 25 S.C.R. 307, on p. 330. In this latter case the law is clearly laid down as follows:

"Poor relations" must be interpreted as meaning "heirs-at-law." The word "poor" is too vague and uncertain to have any meaning attached to it, and must therefore be rejected. The word "relations" then standing alone must be restricted to some particular class, for it it were to be construed generally as meaning all relatives, it would be impossible ever to carry out the terms of the will. A line must therefore be drawn somewhere, and can only be drawn so as to exclude all except those whom the law, in the case of an Intestacy, recognizes as the proper class among whom to divide the property of the deceased person who dies intestate, namely his heirs.

Under our *Devolution of Estates Act,* R.S.M., 1913, ch. 54, sec. 12, the whole estate of the testator in a case of his intestacy, he having died a bachelor, would go to his father. I am

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of the opinion therefore, on the strength of the foregoing authorities, that the clause in question should be construed by eliminating the words, "the most needy and deserving of," as these words are too vague and uncertain to be given effect to. The provision will then read: "To my brothers Thomas and Angus, to be divided equally among themselves and our relatives." The word "relatives" will be restricted to those who could take in case of intestacy under our Statute. There is only one such, namely, the testator's father. The property will therefore be equally divided between the testator's brothers Thomas and Angus and his father. The first question will therefore be answered in the negative and the second as above.

The costs of the motion as between solicitor and client will be paid out of the estate of those parties who appeared and took part in these proceedings.

Judgment accordingly.

COURT OF APPEAL

McLEAN v. McGHEE

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Sale of Goods—Sale of Goods Act, S. 6—"Acceptance" by Buyer.

An attempt by the buyer of an engine to sell it and authorizing another to take and try it were *held* to be acts recognizing a pre-existing contract of sale of it to himself and an acceptance of it by him sufficient to satisfy the requirements of sec. 6 of *The Sale of Goods Act.*

ARGUED: 26th April, 1920.
DECIDED: 11th May, 1920.

Statement.

APPEAL by plainntiff from the dismissal of his action for the price of a second-hand gasoline engine. Appeal allowed with costs.

A. B. Hudson, K.C., for plaintiff, appellant.
G. A. Eakins, for defendant, respondent.

PERDUE, C.J.M.—In August, 1918, one Meakins, since deceased, agreed with the plaintiff, who is an implement dealer, to purchase a tractor engine from him, the plaintiff to take a portable engine belonging to Meakins in part payment provided

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that the plaintiff could sell the portable engine. The plaintiff, defendant, Meakins and Reekie, a traveller for the International Harvester Company, met at Meakins' farm. The terms offered by the plaintiff were satisfactory to the defendant. The plaintiff and Reekie state that the defendant then and there agreed to purchase the engine. Defendant was satisfied with the engine and the terms of payment but denies that the sale was closed. He claims that he was to have a few days' time to consult with one Murdock with whom he intended to form a partnership to do threshing, the plaintiff providing the engine in question and Murdock the separator. The defendant admits that some days after the above meeting he telephoned the plaintiff that he would take the engine. Murdock failed to procure a separator and the intended partnership was abandoned. The defendant says he then telephoned to the plaintiff that he cancelled the sale. It is clear that the plaintiff did not agree to cancel the sale. The plaintiff had sent by mail promissory notes to be signed by defendant in pursuance of the terms of the sale but these were retained by defendant and never returned.

The main defence is that the requirements of sec. 6 of *The Sale of Goods Act*, R.S.M., 1913, ch. 174, have not been complied with. But the plaintiff's answer to this is that in the latter part of September, 1918, the defendant assumed ownership of the machine by attempting to sell it to one Jamieson and by authorizing and requesting Jamieson to take the engine from Meakins' farm and try it to see if it was suitable for Jamieson's purposes with a view to the latter purchasing it. This Jamieson took the engine and while using it he allowed water to freeze in it and cause considerable damage to it.

Jamieson states that at the first conversation defendant told him of the terms between him and the plaintiff but that he, defendant, did not need the engine now. Jamieson then had a telephone conversation with the plaintiff. He told the plaintiff of the conversation he had had with the defendant. The plaintiff said that he had nothing to do with the engine, that he had sent the notes to defendant for settlement. The evidence of this conversation was admitted by consent. About a week afterwards Jamieson met the defendant and they had a

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further conversation. Jamieson told defendant that he, Jamieson, and his partner had decided not to take the engine. Defendant, according to Jamieson, expressed his regret and suggested that Jamieson should take it and try it. Jamieson's wife was present when defendant repeated the suggestion that Jamieson should take the engine and try it and she corroborates her husband in this respect. After Jamieson took the engine it remained at his place and was not repaired.

The learned trial Judge in dealing with the above point assumes that defendant told Jamieson to try the engine to see if it filled his purpose, but considers that this "should not be construed as an acceptance or a constructive taking of possession by McGhee." The trial Judge arrives at this conclusion because defendant says that prior to this he had telephoned to the plaintiff and "cancelled the sale" and that he so informed Jamieson. But the plaintiff denies that the defendant attempted to cancel the sale. In support of his statement the plaintiff produced the letter of December 16, written to him by defendant, in which the latter says:

> Well, I am sending a cheque to pay for the grinder [which he had bought at the same time that he bought the engine], *but I can't pay anything on the engine at present.* I have two men in sight just now to buy the engine, both good men too.

He goes on in the letter to state that he would like to see the plaintiff and try and make arrangements about selling the engine. He writes:

> Don't think that I am trying to do you out of the money because I aint, only it is no use to us and I haven't got the money to put into it to lay idle.

With respect, I think the trial Judge overlooked the importance of this letter. It shows that the defendant acknowledged the purchase and admitted that he was still liable when the letter was written, more than two months after Jamieson had received the engine. The attempted explanation given by defendant of his statements in the letter are ineffective and trivial and throw doubt on the value of his testimony as a whole.

The terms of the sale were arranged when the plaintiff and defendant met at Meakins' farm, but the defendant claims

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that the requirements of sec. 6 of *The Sale of Goods Act* were not complied with. It is enough if the buyer shall accept the goods sold and actually receive the same. By subsec. (3) of the above sec. 6:

> There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

In *Chaplain v. Rogers,* 1 East 192 (6 R.R. 249) the parties being together in the plaintiff's farm yard agreed to buy a stack of hay standing in the yard at a certain price per hundred weight. Two months afterwards a third party agreed with defendant to buy part of the hay still standing untouched in plaintiff's yard. Defendant sent the third party to look at the hay with the purpose of buying it and the latter took away a part of it. It was held that the defendant had dealt with the commodity as if it were in his actual possession, and there was therefore sufficient evidence of a delivery and acceptance to take the case out of *The Statute of Frauds.* In giving judgment Lord Kenyon said:

> Where goods are ponderous, and incapable as here of being handed from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person.

Chaplain v. Rogers, supra, was followed in *Marshall v. Green,* 1 C.P.D. 35, 45 L.J.C.P. 153.

Abbott v. Wolsey [1895] 2 Q.B. 97, 64 L.J.Q.B. 587, was a case where goods sold were delivered to the buyer who took a sample from them, and, after examining it, said that the goods were not equal to his sample and that he would not have them. It was held that there was evidence of an act done by him which recognized a pre-existing contract of sale and therefore evidence of an acceptance within the meaning of *The Sale of Goods Act,* 1893, ch. 71. Lord Esher, M.R. points out that the acceptance that satisfies the statute and the acceptance that binds the purchaser are different things. The acceptance under sec. 4 of the English Act (our sec. 6) is such

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an acceptance as will show the existence of a contract which the Court may enforce. This is a different acceptance from that described in sec. 35 (our sec. 35) which is to bind the purchaser to pay for the goods. A. L. Smith, L.J. in the same case said:

> The question what shall be an acceptance in performance of the contract is dealt with by s. 35, and we have nothing to do with that. The question, therefore, which we have to decide is whether there is any evidence of an act done by the defendant in relation to the goods which recognized a pre-existing contract of sale.

Rigby, L.J. said:

> The mere words would as such produce no effect; but an act done in relation to the goods which recognizes a pre-existing contract of sale is sufficient.

In *Taylor v. Great Eastern Ry.* [1901] 1 K.B. 774, 70 L.J. K.B. 499, a quantity of barley had been shipped to the buyer and he was notified that it awaited his order at the station. Bigham, J. held that an attempt by the buyer to resell was clearly an act in relation to the goods which recognized a pre-existing contract of sale and, therefore, an acceptance.

I think the evidence establishes that the defendant attempted to sell the engine to Jamieson. At all events he exercised such a right of ownership over it that he authorized Jamieson to take the engine and try it, which Jamieson did with the unfortunate results that followed.

But, in addition to this, defendant states in his letter of December 16 that he had then two men in sight to buy the engine. When Jamieson failed to buy, the defendant offered the engine for sale to others.

I think the acts of the defendant recognized a pre-existing contract of sale of the engine to him and that there was an acceptance of it by him sufficient to satisfy the requirements of the statute.

I would allow the appeal and enter judgment for the plaintiff for the amount claimed with costs in both Courts.

CAMERON and HAGGART, JJ.A. concur in allowing the appeal.

FULLERTON, J.A.—This action is brought to recover the price of a second-hand gasoline engine. The only defence is

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that sec. 6, ch. 174, R.S.M., 1913, has not been complied with. Sec. 6 provides that

A contract for the sale of any goods of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

Now it is admitted that nothing was given in earnest to bind the contract or in part payment and that there is no note or memorandum in writing of the contract.

Subsec. 3 of sec. 6 provides that: [See *ante*, p. 389].

The appellant contends that acts were done by the defendant in relation to the goods which recognize the pre-existing contract. The learned trial Judge has found against this contention. I have carefully read the whole of the evidence given on the trial and have arrived at the conclusion that there was an acceptance within the meaning of the statute.

The engine in question originally belonged to one Meakins who in the summer of 1918 lived about 12 miles from Shoal Lake. Early in August, the plaintiff had arranged with Meakins to sell him a tractor and take in part payment the engine in question, providing Meakins could effect a sale of his engine. A few days prior to August 26, 1918, Meakins called up the plaintiff by telephone and told him that he had a purchaser for the engine—the defendant—and asked him to be at Meakins' place on a certain day to meet defendant. Accordingly plaintiff went to Meakins' place on the day appointed, accompanied by a man named Reekie, who was a traveller for the International Harvester Company. Plaintiff, defendant, Meakins and Reekie were all present at Meakins' place when the sale of the engine to defendant was discussed. Plaintiff's story of the arrangement that was there effected is as follows: (P. 4.)

Q. After dinner what was done then? Any talk between you and McGhee? A. Mr. McGhee asked me the price of the engine and the terms and I told him and he bought it. He wanted to know the difference between time and cash and I told him and he bought it.

Q. What was the conversation between you and him as to price? A. It was $500 cash, or $550 on terms of two falls: $275 the 1st of November

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and $275 the following November. Mr. McGhee said, "Will you make it $250 if we pay the first note within thirty days?" And I agreed to do that.

Q. You agreed to do that? A. I told him I would draw the notes due the 1st of November with the first note written on it "Discount of $25, provided it was paid within thirty days.

Q. What did McGhee say to that? A. It was agreeable.

Reekie, who was called by the plaintiff, completely corroborates the story of the plaintiff.

Defendant admits that the price and terms were entirely satisfactory to him, but that he stated to plaintiff he could do nothing definite that day because he had first to consult his partner Murdock.

In an attempt to corroborate his story defendant called Murdock, who was permitted to say that he was present and heard defendant ring up plaintiff and say to him: "I guess, Jack, we will take that engine." The plaintiff says there was never any such telephone conversation. The learned trial Judge makes no finding as to whether the sale was closed at the Meakins place or subsequently by telephone, although one might gather from his reasons for judgment that he was of the opinion that the sale did take place at the Meakins place, because he discusses the question of whether or not any possession of the engine was taken by the defendant on that day.

For reasons which I will give later, I would give no weight whatever to the evidence of the defendant where he is contradicted by other witnesses. The evidence of Murdock, while probably admissible, is not entitled under all the circumstances to much weight when opposed by the evidence of both the plaintiff and Reekie, both of whom say that the sale was closed at the Meakins place and that it was in no way conditional on the approval of any partner of the defendant. I would hold that the sale was closed at the Meakins place.

The learned trial Judge finds that there was no delivery of possession at the Meakins place on the day the sale was closed.

The engine was standing in Meakins yard when the conversation took place. After the sale was completed, plaintiff said he would draw the notes and send them to the defendant. The defendant and Meakins then started up the engine and began

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crushing oats for the defendant and immediately afterwards plaintiff and Reekie left the premises. The learned trial Judge thinks this was not an act in relation to the goods which recognizes a pre-existing contract within the meaning of subsec. 3 of sec. 6 above quoted. He says on this point at p. 191:

> It is true that a few minutes later some oats which McGhee was buying from Meakins were crushed with the use of this engine; both men attending to this operation, but the same thing had been done in exactly the same manner two weeks before, so that this last occurrence had no significance with respect to acceptance.

I think the learned Judge has overlooked the fact that the engine only became the property of the plaintiff on the day of the sale. The deal which Reekie had previously made with Meakins for the sale to him of a tractor was conditional on Meakins effecting a sale of his engine. When defendant and Meakins were using the engine on the previous occasion it was the property of Meakins, but after the sale was arranged the property in it passed to plaintiff and from him to defendant. One would almost think that when an article, such as an engine, is on the property of a third party and a sale of it is made there and the vendor then leaves the premises and the purchaser remains, that the latter should be regarded as having taken possession of it, particularly when the third person is present and knows about the sale. Certain it is that Meakins, who died before the trial, recognized that he was a bailee of the engine for the defendant because later on, when a man named Jamieson removed it from his premises he immediately rang up and notified, not the plaintiff, but the defendant, of the fact. At the argument I asked counsel for the defendant to suggest something further that plaintiff should have done to give defendant possession, but received no satisfactory answer. The additional fact that the defendant began to operate the engine to crush oats for himself appears to me to be conclusive on the question of possession.

However, if I am mistaken in my view that the sale was made at the Meakins place, and it was in fact completed some days later, when defendant says he telephoned the plaintiff that he would take the engine, I am still of the opinion that there was a subsequent "act" of the defendant which recognized the pre-existing contract.

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Defendant says that five days after he had telephoned plaintiff that he would take the engine, he telephoned him cancelling the contract. His words are (p. 113):

I phoned McLean and told him that as the fellow we were going to lease the separator from was going to thresh himself and had told us we could not get it, therefore we would have to cancel the engine.

Plaintiff denies that anything was said about cancelling the sale but admits that defendant phoned him and said he had made different arrangements and wished him to try and sell the engine for him. It makes no matter, in this instance, which story is true as admittedly plaintiff declined to accede to the sale being cancelled and consequently a good and valid contract for the sale of the engine is still in existence.

In the latter part of September, 1918, one Jamieson saw the defendant about purchasing the engine. Jamieson was called as a witness by the plaintiff. He stated in effect that defendant explained the terms of his purchase from plaintiff and said (pp. 61-2):

He didn't need the engine now, that they had dealt in another machine, and he said we could have the engine.

Jamieson further said in his evidence (p. 61):

Of course, in that conversation he explained the deal and he said something about McLean having something to do with it. He gave me to understand that it was hardly a decided thing between the two of them. I was undecided, myself, when I left McGhee as to who was the real owner of the engine.

Jamieson says he told McGhee he would see his partner Doherty and would let him know later on what he had decided. He then called up McLean who said he had nothing to do with it. Two or three days afterwards Jamieson and his wife went to see the defendant. After some discussion regarding the engine defendant said to Jamieson:

Take it over and try it out to our satisfaction and if it was not satisfactory, we need not keep it.

Mrs. Jamieson was called and stated that on the occasion last mentioned she heard defendant say to her husband

to take the engine and try it and if it didn't prove satisfactory he didn't have to keep it.

Defendant denies this conversation and says (p. 118):

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I told him to see McLean about getting the engine upon trial; I could not give him the engine on trial, I had never signed any notes and the engine was not mine.

At all events Jamieson took possession of the engine, removed it to his own place, used it for some days and allowed the cylinders to freeze up and crack.

Now, at this stage I had perhaps better give my reasons for thinking that the defendant is an utterly unreliable witness.

Defendant says that Jamieson sometime later on telephoned to him and said that the engine didn't have power enough to drive the mill, that he wished to get an engine that would drive it, that he had phoned plaintiff but could get no satisfaction, that plaintiff and he were bad friends and that he thought if defendant would phone him a deal could probably be made.

Defendant says he phoned plaintiff and said to him (p. 122):

I asked him how it was he seemed to be assuming this position, that he was trying to hold us for the engine.

He says the plaintiff replied (p. 123):

I am not trying to hold you on the engine but Jamieson came to him wanting all kinds of time to try the engine.

The learned Judge very properly pointed out that there was nothing in the conversation with Jamieson that day to warrant such a conversation with the plaintiff.

On December 16, 1918, the defendant wrote the following letter to the plaintiff:

Pope, Man., Dec. 16th.

Mr. McLean,—

Dear Sir: I suppose you will be thinking that I never intend to pay you. We have been shut up here for six weeks with the fever so I have never been able to get up to see you. Well, I am sending a cheque to pay for the grinder, but I can't pay anything on the engine at present. I have two men in sight now to buy the engine, both good men too. One of them is Lou Doherty, at Oswald, and the other is William Lavina, so I would like to come up and see you and make arrangements about selling it as it is of no use to us only I intend to do what is right. Our crop was very poor here this year, it went from 8 to 10 bushels per acre so by the time we pay running expenses out of that there isn't a great lot left so I would like you to think it over but dont think that I am trying to do you out of the money because I aint, only it is no use to us and I haven't got the money to put into it to lay idle. Hoping to hear from you soon, I am,

Yours truly,

[Sgd.] John McGhee, Pope.

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In the face of this letter there can be no doubt whatever that the alleged telephone conversation sworn to by McGhee never took place. Moreover, the letter clearly recognizes his liability to pay for the engine and is entirely inconsistent with the position he claims to have taken at the time Jamieson was negotiating with him for the engine.

Defendant's attempted explanation on the trial of his own letter shows how little reliance can be placed on his evidence. At p. 35 he was asked by his own counsel:

> Q. You say here "I would like you to think it over, but don't think I am trying to do you out of the money." Think over what? A. Think over to let me know if he wanted us to come up and get the thing in shape to sell to somebody else who needed it. The shape the engine was in nobody could do anything with it.

The absurdity of this answer is apparent when it is remembered that there is nothing in the letter about the engine having been damaged and so far as the evidence shows plaintiff knew nothing about it at the time.

The learned trial Judge has taken the view that what defendant told Jamieson as to taking the engine and trying it should not be construed as an acceptance or a constructive taking of possession by him. I cannot agree with this view. I think the act of the defendant in dealing with the engine as his own was "an act" in relation to the goods which recognized a pre-existing contract of sale to him.

I would allow the appeal with costs and enter judgment for the plaintiff for the amount claimed with costs of the trial.

DENNISTOUN, J.A.—Taking the findings of fact made by the learned trial Judge in this case I am of opinion that the appeal of the plaintiff should be allowed and judgment entered for him.

McLean and McGhee entered into a valid contract for the sale and purchase of a portable engine. The contract was, however, not enforceable as there was in the early stages of the matter neither part payment, acceptance, nor a memorandum sufficient to satisfy sec. 6 of *The Sales of Goods Act*, R.S.M., 1913, ch. 174.

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The trial Judge finds that the defendant McGhee cancelled this contract by a telephonic conversation with the plaintiff McLean, and that what he did subsequently had no effect on the contract so determined.

In my opinion he could not rid himself of the contract by any such summary procedure against the will of the plaintiff, and it is clear that the plaintiff refused to consent to cancellation.

Subsequently the defendant permitted one Jamieson to take the engine on trial with a view to purchase. So soon as he did this he satisfied the requirements of the section and made the contract enforceable against himself. *Taylor v. Great Eastern Ry.* [1901] 1 K.B. 774, 70 L.J.K.B. 499; *Abbott v. Wolsey* [1895] 2 Q.B. 97, 64 L.J.Q.B. 587.

I would allow the appeal and enter judgment for the plaintiff with costs here and below.

Appeal allowed with costs.

CHAMBERS

GROSSENBACK V. GOODYEAR AND SUTHERLAND (*Claimant*)

Before MATHERS, C.J.K.B.

Practice—Charging Order—Power of Court to Make.

The Court has power to make a charging order upon money in Court.

Chose in Action—Moneys Paid by Defendant into Court and Deposited in Bank—Assignment by Defendant of Debts Due from Bank.

An assignment of a defendant's "claims and demands against" a bank "for debts due" to him would not affect a sum paid by defendant into Court as security for costs (in respect of proceedings not prosecuted) and deposited in such bank.

Whether as against an execution creditor notice of assignment of a claim must be shown, discussed.

DECIDED: 3rd March, 1920.

Statement.

MOTION by plaintiff to make absolute a charging order upon a fund in Court.

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MATHERS, C.J.K.B.

E. R. Siddall, for plaintiff.

W. H. Trueman, K.C., for defendant.

MATHERS, C.J.K.B.—This is a motion by the plaintiff to make absolute a charging order upon a fund in Court.

In March, 1919, the plaintiff recovered a judgment against the defendant for $3,629.99. In July, an appeal by the defendant to the Court of Appeal was dismissed (15 Man. R. 38, [1919] 3 W.W.R. 12).

On or about December 29 last past, the defendant paid into this Court the sum of $500 as security for the costs of an appeal to the Supreme Court of Canada, but on January 20, 1920, leave to appeal was refused by the Court of Appeal. On February 7 instant, the plaintiff obtained an order *nisi* charging the $500 in Court, under the Imperial Statute, 1 & 2 Vict., ch. 110, and his present motion is to make the charging order absolute.

The motion is resisted by the claimant upon several grounds. In the first place he argues that the Imperial Act, 1 & 2 Vict., ch. 110, does not apply to moneys in Court and consequently there is no authority for the order asked for. In support of this contention he cites *Howe v. Martin,* 8 Man. R. 533, where Dubuc, J. held that 1 & 2 Vict., ch. 110, sec. 14, did not apply to money in Court.

Sec. 14 of 1 & 2 Vict., ch. 110, applies only to government stock funds, annuities and stock shares in a public company and 3 & 4 Vict., ch. 82, applies only to the interest or dividends thereon, and plainly does not apply to money in Court.

Before the decision in *Howe v. Martin, supra,* the English Court of Appeal had so ruled in *Brereton v. Edwards,* 21 Q.B.D. 488, 60 L.T. 5. In the latter case, however, it was held that the authority to make a charging order upon money in Court did not depend upon either sec. 14 of 1 & 2 Vict., ch. 110, or 3 & 4 Vict., ch. 82, but that such authority was derived from the inherent power of the Court of Chancery coupled with sec. 12 of the first-named Act, by which a sheriff was empowered to seize money, bank notes, cheques, bills of exchange, promissory notes, bonds and securities for money.

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That case, it seems to me, settles the question of the power of the Court to make the order asked for.

If there was power to make the order, the claimant says that the money nevertheless belongs to him by virtue of a prior assignment in writing, dated January 6, 1920, and notice thereof to the Bank of Hamilton, in which bank the Court funds are deposited.

The writing relied upon is executed by the defendant under seal and for the expressed consideration of one dollar purports to

> sell and transfer to the said Alexander John Sutherland [the Claimant] all my claims and demands against the Bank of Hamilton, of the City of Winnipeg, for debts due to me

and it appoints the claimants

> his attorney irrevocable and doth give him and their [*sic*] full power and authority to collect the sum of $500, which [was placed] in the said bank on the 29th day of December, A.D. 1919.

The document purports only to assign to the claimant the defendant's "claims and demands against the Bank of Hamilton," "for debts due" to him. For the $500 paid into Court as security for costs the defendant had no "claim or demand against the Bank of Hamilton" nor in respect of this $500 was there a "debt due" from the bank to him. His claim to the money in Court in so far as it is based upon this writing must therefore fail.

In the alternative, he claims the fund as an equitable assignee thereof. The evidence before me is not sufficient to sustain this claim; but the claimant asked leave to adduce further evidence and his counsel expressed the confident belief that if given an opportunity he could establish his claim under an equitable assignment.

The claimant did not give notice of his assignment in the only way in which notice of a claim to a fund in Court can be given, viz., by obtaining a stop order: *Pinnock v. Bailey*, 23 Ch. D. 497, 52 L.J. Ch. 880; *Mutual Life Assur. Co. v. Langley*, 32 Ch. D. 460; *Mack v. Postle* [1894] 2 Ch. 449, 8 R. 339. But it would seem that, as against the plaintiff, an exe-

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cution creditor, notice was not necessary: *Rennie v. Quebec Bank*, 1 O.L.R. 303, 3 O.L.R. 541, although he had obtained a charging order: 4 *Halsbury*, par. 803.

As I propose to give the claimant an opportunity of proving if he can a good equitable assignment, I refrain from expressing any definite opinion on this point.

Upon the claimant paying the plaintiff the sum of $15 to cover the costs of this motion, within five days, I will, upon an appointment being obtained, hear and determine the question in a summary way in Chambers, upon such additional evidence by affidavit, deposition, or *viva voce* as the parties or either of them see fit to adduce, or if either party objects they may proceed to the trial of an issue as to whether the said fund has been assigned to the claimant in the regular way, in which issue the claimant shall be plaintiff.

If the said costs be not paid within the time limited, an order will go making the charging order absolute.

Judgment accordingly.

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COURT OF APPEAL

1920

BANCROFT *v.* CANADIAN PACIFIC RAILWAY COMPANY

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Libel—Privileged Occasion—Malice—Function of Judge at Trial.
Master and Servant—Right of Dismissal—Function of Judge at Trial.

If a Judge at trial of an action for libel takes the view that the occasion was privileged and that there is no evidence of malice, he should withdraw the case from the jury and give judgment for the defendant.

An occasion is privileged where the person who makes a communication has an interest or a duty to make it to the person to whom he does make it, and the person to whom he does make it has a corresponding interest or duty to receive it.

Plaintiff was employed by defendant railway company. Some fruit stolen from defendant's car was found on plaintiff's premises and he was charged with theft and committed for trial. Being then asked by an official of defendant how the fruit got into his possession, he refused to answer and was dismissed from service. He was subsequently acquitted at the trial. Being refused reinstatement by defendant he had the matter, according to an established practice, taken up by the officials of his labour union with defendant's officials. In the course of these negotiations the labour union officials required his "certificate of service" which would give reasons for his dismissal. Plaintiff asked defendant for this, explaining why he wanted it. On receiving it from headquarters, defendant's superintendent, not having plaintiff's address, sent it to one of the labour union officials who was dealing with the case on plaintiff's behalf. It contained the words "dismissed for being implicated in case of theft of fruit from car."

Held the communication was privileged; and the fact that the first reasons for dismissal were for refusing to answer questions and were changed to what appeared on the certificate of service was not evidence of malice (nor evidence of a wrongful dismissal); nor was the fact of defendant's knowledge of plaintiff's acquittal at the time of sending the certificate which was issued on information in the staff record office based on the form of dismissal filed long before.

It was held also that plaintiff could not recover for wrongful dismissal; Fullerton, J.A., on the ground that he had failed to establish his alleged contract of hiring, and Dennistoun, J.A., on the ground that defendant was by law entitled to dismiss on plaintiff refusing to give information concerning the stolen goods found in his possession. (The other Judges concurred without written reasons.)

If a servant does anything incompatible with the due or faithful discharge of his duty, the master has a right to dismiss him. Where the facts are undisputed it is for the Judge to say whether they are sufficient in law to warrant a dismissal. (Per Dennistoun, J.A.).

ARGUED: 18th May, 1920.
DECIDED: 10th June, 1920.

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Statement.

APPEAL by plaintiff, and cross-appeal by defendant from judgment of Prendergast, J. in an action for damages for wrongful dismissal and for libel. Appeal dismissed with costs and cross-appeal allowed with costs.

D. Campbell and *O. H. Campbell,* for plaintiff, appellant.

A. J. Andrews, K.C. and *C. H. Green,* for defendant, respondent.

PERDUE, C.J.M., CAMERON and HAGGART, JJ.A. concur.

FULLERTON, J.A.—This action was brought to recover damages for libel and also damages for wrongful dismissal.

The plaintiff was for sometime prior to August 7, 1917, in the employ of the defendants as a telegraph operator at their yard office in Regina. On July 27, 1917, he was arrested and charged with stealing a crate of cantaloupes. On August 6, at the conclusion of his preliminary examination, he was committed for trial, and on August 7 was discharged by the defendant from its employ. The procedure in the case of a telegrapher in the employ of the defendant, claiming to have any grievance in connection with his treatment by the company, is to apply personally to the company for an adjustment and, failing this, to have the matter referred to the local chairman of the telegraphers' union who takes the matter up with the proper officer of the company. If he fails to get the matter adjusted he refers it to the general chairman of the union who, if necessary, refers it to the general manager. On September 24, 1917, the plaintiff, claiming that he had taken his trial and had been acquitted of the charge made against him, applied to the defendant for reinstatement. This having been refused he applied to Mr. Barry, the local chairman of the telegraphers' committee at Regina. Barry took the matter up with the division superintendent at Regina, Mr. Chown, who refused reinstatement. Upon being advised of this by Barry, the plaintiff requested him to turn the case over to the general chairman of the telegraphers' committee, Mr. Mien. This was done and Mien requested the plaintiff to meet him in Moose Jaw on December 9, 1917, and bring with him his certificate of service. Plaintiff applied for this at the office of Chown at Regina, but was unable to secure it as all certificates

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of service were issued from the staff record office at Winnipeg. He, however, went to Moose Jaw on December 9 as requested by Mien. There he learned that Mien had the plaintiff's notice of dismissal and on his return to Regina was informed by Barry that he had received the certificate of service which plaintiff had applied for before leaving Regina.

These are the documents referred to in par. 8 of the statement of claim, and it is in respect to the statement contained in these documents: "Dismissed for being implicated in a case of theft of fruit from car" that the plaintiff charges libel against the defendant.

At the argument counsel for the plaintiff stated that he rested his case, so far as his claim for libel was concerned, solely on the certificate of service. This document is one that is always, when requested by employees who have been dismissed, issued to them by the company and in it are shown particulars of the employee's service with the company and the cause of his dismissal.

Mr. Justice Prendergast, who presided at the trial, withdrew from the jury the question of libel, but allowed the claim for wrongful dismissal to go to the jury. The jury found that the plaintiff was unjustly dismissed, assessing the damages at $425.

The plaintiff now appeals from the judgment of the learned trial Judge withdrawing the plaintiff's claim for damages for libel from the jury and the defendant cross-appeals against the verdict of the jury and the judgment entered in accordance therewith.

A great deal of evidence was given by the plaintiff with regard to the charge of stealing cantaloupes and as this charge was the cause of his dismissal and has also an important bearing on the question of the alleged libel, I propose first to give a summary of this evidence. The plaintiff's story is that on or about July 27, 1917, his house in Regina was searched and the officers there found a crate of cantaloupes which he admits were proved by very clear evidence at his trial to have been stolen from a car standing in the defendant's yards at Regina which had been broken into. The plaintiff also admitted that

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he had heard of some cases of pilfering from cars standing in the yards at Regina. His explanation of his possession of the cantaloupes is that he bought them from a man while he was on duty at the yard office at Regina. The time was dusk on a Sunday evening and the man was standing outside the yard office. Asked what the man was doing there he answered that he inferred he was waiting for a freight train to go past so that he could cross the track. He also inferred that the man was coming from a wholesale fruit house, did not think it a curious thing for a man to be coming from a wholesale fruit house at that hour on Sunday night and gave as a reason that he understood they had a watchman there at all hours of the night and day. He could not remember the details of the conversation with the man but he offered to sell them to him, making the remark that they were very heavy to carry home. He offered them to him at what he considered a very reasonable price, $5. He admits they were worth $12.50.

Now, dealing first with the appeal of the plaintiff from the refusal of the learned trial Judge to submit the question of libel to the jury, as above pointed out, the plaintiff complains only of the certificate of service and contends that it is libelous and was published to Barry, the local chairman of the telegraphers' committee.

The certificate in question is dated Winnipeg, December 8, 1917. Under the heading "Details of service" it gives the occupation of the plaintiff, the different places at which he had worked while in the company's service and the length of service at each place. Under the heading "Reason for leaving" is "Dismissed." Under the heading "Remarks" are the words complained of "For being implicated in case of theft of fruit from car."

The certificate bears the office stamp of the Staff Record Office, Canadian Pacific Railway Company, Winnipeg, and is signed "D. Gray, Chief of Staff Records."

It appears from the evidence that when a man is discharged from the service of the company a regular form is filled up by the superintendent in charge of the particular division, giving

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the reasons for his discharge. This form is forwarded to the staff record office at Winnipeg and filed there.

The plaintiff was discharged on the day after he was committed for trial and at that time the form was prepared showing the reason for his discharge: "For being implicated in case of theft of fruit from car." This form was in due course sent to the staff record office at Winnipeg. Now, clearly no objection can possibly be taken to the correctness of the above-stated reason for discharge.

Now, let us see the circumstances under which the certificate of service which is complained of came into the possession of Barry.

Following the regular course of procedure, when the company declined to reinstate the plaintiff he appealed to the telegraphers' union and, as plaintiff himself admits, the union owed a duty to every one of its members to deal with any complaint he might have against the company. The plaintiff further admits that one of their duties was to get all the information possible from the company as to the cause of dismissal. Barry, as local chairman of the telegraphers' committee at Regina, had first taken up the matter on behalf of the plaintiff. The plaintiff had given him full particulars of his case including all the circumstances in connection with the criminal charge. Barry then saw Chown, the division superintendent at Regina who had discharged the plaintiff, but failed to induce him to reinstate the plaintiff. As previously stated the matter was then taken up by Mien, the general chairman.

Under date December 4, Mr. Mien addressed a letter to Barry, plaintiff and one Cheney in which he says:

> I would like to meet Brothers Barry and Bancroft at Regina on arrival of No. 1, if possible, to discuss Bro. Bancroft's grievance, before going to Moose Jaw. If Bro. Bancroft cannot arrange to do this, perhaps he could come to Moose Jaw on Sunday and attend meeting there when I could talk the matter over with Bro. Barry and him. I would be glad to meet one of you on arrival of No. 1 and advise what arrangements you can follow out. I desire to meet you both together.

On December 5, 1917, Mien wrote the following letter:

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Order of Railroad Telegraphers.

Winnipeg, December 5th, '17.

W. J. Barry, Esq.,
C. O. Bancroft, Esq.,
G. J. Cheney, Esq.,

Dear Sir and Brother:—

My letter of yesterday to you evidently has crossed with letters received from Bros. Barry and Bancroft regarding Bro. Bancroft's case.

As the matter has now been taken up by the Local Chairman with his superintendent in the regular way, it will be in order for me to appeal to the General Superintendent, and I have written to Mr. Stevens requesting an interview with him on Saturday, December 8th, on my arrival in Moosejaw.

It will not now be necessary for me to stop over at Regina. I would like to be in Moosejaw before the train that leaves Regina about 14.30 gets to Moosejaw, as it would leave time rather short to arrange meeting with Genl. Supt. Bro. Bancroft has not given me much of the particulars of his case, so that I am somewhat handicapped, however, I will go ahead and do the best I can, *but I want to have his form 104 which gives reason for dismissal* as without it I am not in a position to discuss the case intelligently. I would therefore request that *either Bro. Barry or Bancroft meet me on No. 1 Saturday at Regina and hand me this form* along with other particulars.

Yours fraternally,

[Sgd.] J. M. Mien,
General Chairman.

As a result of this request the plaintiff says:

I communicated with Mr. McGuire [Chown's Chief Clerk] requesting my service letter; I requested it in time to take it out to Moosejaw on Sunday (the 9th) and this was on Friday. He said it would be impossible on account of the paper being issued in Winnipeg; and I said if I could not get it in time for Sunday I would call for it the following week on my return from Moosejaw.

It is quite evident that Chown immediately applied to the staff record office in Winnipeg for the certificate as it is dated December 8, and we find a letter in evidence from Chown, dated December 10, addressed to Barry reading: "I enclose herewith form 104, certificate of service, in favour of C. O. Bancroft. Please acknowledge receipt."

The following discovery evidence of Chown referring to the certificate was put in by the plaintiff:

Q. Why didn't you send it to Bancroft? A. We hadn't Bancroft's address.

Q. Now you did not endeavour to send Exhibit B by mail. A. Bancroft came into the office and asked for that twice, and if he had said

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"Will you mail it to me?" it would have been mailed to anywhere in the world, as far as that goes.

Q. No instructions to send it any place? A. No. And we gave it to Mr. Barry; he knew where he was and he was acting for him right along.

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I think it extremely doubtful under the circumstances if it can even be said that the delivery of the certificate to Barry was a publication. Without deciding this, however, it is perfectly clear that the communication was privileged.

Counsel for the plaintiff contends that, even if privilege existed, there is evidence of malice which should have been submitted to the jury. As evidence of malice he points to the fact that when plaintiff was charged with the offence Chown called him into his office and asked him for information as to how the cantaloupes got into his possession and upon plaintiff refusing to answer Chown dismissed him for refusing to answer questions. Upon the form being submitted to the general superintendent it was changed to "dismissed for being implicated in case of theft of fruit from car." How can it possibly be suggested that this is evidence of malice? Both reasons were quite correct. The general superintendent had the idea that, while the reason suggested by Chown was a good one, that suggested by himself was a better.

Counsel for the plaintiff also claimed that the defendant knew, when the certificate was issued, that the plaintiff had been acquitted and with this knowledge the issue of the certificate with the words complained of was evidence of malice.

The information on which the certificate was issued was a matter of record in the staff record office based on the form of dismissal filed months before. The reason for dismissal was given at the time of the dismissal and to give any other reason in the certificate would be to give not the true but some other reason.

To my mind there is not a shadow of evidence of malice in the whole case.

The learned trial Judge evidently took the view that the occasion was privileged and that there was no evidence of malice. Under these circumstances it was clearly his duty to withdraw the case from the jury.

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The rule as laid down in *Odgers on Libel and Slander* at p. 691 is as follows:

> If privilege has been pleaded, the facts on which the claim of privilege is based must be proved before the judge can rule whether the occasion is privileged or not. If at the conclusion of the plaintiff's case, facts sufficient to support the plea of privilege have been clearly established and no evidence of malice has been given, the judge should enter judgment for the defendant and not let the case go to the jury.

Now as to the claim for wrongful dismissal, the contract of hiring is alleged in par. 5 of the statement of claim in the following terms:

> At the time of the said dismissal of the plaintiff and for some time prior thereto the plaintiff was earning an average of $130 per month, and the continuity of his employment was subject only to the efficient and faithful discharge of his duties and to the determination thereof according to law and according to the terms of his contract of employment, and he was also entitled to advancement in his employment whereby he would receive increased remuneration and more profitable employment.

Apart from the allegation in par. 3 that the plaintiff was employed by the defendant the above is the only allegation in the statement of claim concerning his contract of hiring.

The evidence wholly fails to support any such contract.

What the plaintiff relied on at the trial as supporting such a contract was an agreement between the telegraphers' union and the defendant covering wages and the working conditions of the men. The fact is that no such agreement was ever established. A book containing what purported to be a copy of the agreement was tendered in evidence at the trial. Not a line of evidence was given to show that it was in fact a copy of such an agreement and there is absolutely nothing to justify its admission. Even if such an agreement had been proved it could not possibly help the plaintiff. It would be hopeless to urge that an agreement between the union and the defendant would enable every individual workman to attach the conditions of such an agreement to his own contract of service.

The object of the agreement is, of course, to secure uniform working conditions among the men and to provide means for the adjustment of disputes between them and the company and thereby prevent strikes. It is doubtful if such an agreement

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could be enforced at law even by the union itself, which has its own method of enforcement by going out on strike.

The evidence of the plaintiff as to the terms of his employment is as follows:

Q. Were you hired for any definite period by the Canadian Pacific Company? A. Did I have a contract for any definite period?

Q. Yes. A. They were at liberty to dismiss me at any time they saw fit, or I could have resigned at any time.

Q. Your pay was every fortnight? A. Every thirty days.

The plaintiff has therefore wholly failed to establish the contract of hiring set up in his pleadings and cannot therefore recover for wrongful dismissal.

I would dismiss the appeal with costs and allow the cross-appeal with costs, including the costs of the trial.

DENNISTOUN, J.A.—The plaintiff brought action against the defendant company asking damages for libel and for wrongful dismissal. The Judge at the trial entered a nonsuit on the claim for libel and gave judgment on the claim for wrongful dismissal for $425 on the verdict of the jury. The plaintiff appeals against the nonsuit and the defendant cross-appeals against the verdict.

To deal first with the claim for wrongful dismissal, the plaintiff puts his case as follows:

He was in July, 1917, employed as a telegraph operator by the Canadian Pacific Railway Company at Regina. His wages were estimated on a monthly basis and paid fortnightly and the learned trial Judge considered this to be evidence of a monthly hiring although the plaintiff said—"They were at liberty to discharge me at any time they saw fit, or I could have resigned at any time." I accept the view of the trial Judge that there was some evidence of a monthly hiring but do not propose to consider the matter further as the case does not appear to turn on that point.

About August 1, the plaintiff's rooms were examined under a search warrant when a portion of a shipment of cantaloupes which had been stolen from a car in the Regina yard was found in his possession. He was arrested and admitted to bail. A few days later he received a preliminary hearing be-

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fore a magistrate and was committed for trial at the next assizes, being again released on bail.

The district superintendent of the railway, Mr. Chown, then sent for him and asked him how the cantaloupes got into his possession. He refused to answer on the advice of counsel. Mr. Chown then dismissed him.

He came up for trial in September and giving evidence on his own behalf said that he bought the cantaloupes from an unknown man on a Sunday evening about dusk in the railway yard. The man was carrying a crate of 48 cantaloupes which he offered to sell for $5. The plaintiff paid the sum demanded and took the crate into his office for the night. In the morning he sent it to his house by transfer waggon. There was no corroboration of these statements, nevertheless the plaintiff was acquitted of the charge of theft.

In my opinion the superintendent was by law entitled to dismiss the plaintiff summarily on his refusal to give any information concerning the stolen goods which were found in his possession. Bancroft did not make any protest against the suspicion under which he rested. He made no claim to innocence. He was possibly well advised by his counsel to make no answer of any kind and to reserve his defence until the moment of the trial, but in electing to do so he knew that he thereby forfeited the confidence of his employers and permitted them to think the worst.

If he had given Mr. Chown the explanation which he afterwards gave at the trial it would probably have availed him little, even if believed.

That a trusted railway employee in a responsible position should be trafficking at dark on a Sunday night in the railway yard with unknown persons, and purchasing goods which very slight inquiry would have shown to have been stolen from the company was in itself a ground for instant dismissal. How much more when the accused, whose duty called upon him to disclose all he knew to his employers, stands mute when questioned and refuses to say anything, or even to claim that he is innocent.

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Lord Esher, M.R. in *Pearce v. Foster,* 17 Q.B.D. 536, at p. 539, 55 L.J.Q.B. 306, says:

> The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him.

What constitutes good and sufficient cause for the discharge of a servant is a question of law, and where the facts are undisputed, it is for the Court to say whether the discharge was justified. But where the facts are disputed it is for the jury to say upon all the evidence whether there were sufficient grounds to warrant the discharge. 26 *Cyc.* 1016.

Maclennan, J.A. in *McIntyre v. Hockin,* 16 O.A.R. 498, at p. 500, says:

> Notwithstanding some earlier cases to the contrary, I think it is now settled that it is for the Judge to say whether the facts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction.

In the case at bar the conduct of the plaintiff was not in accordance with his duty. There was valid ground in law for his dismissal. There was no dispute as to the facts. The plaintiff's own story put him out of Court. The defendants called no witnesses and it was the duty of the learned trial Judge to have so determined and to have dismissed the action on this branch of the case.

It was urged that the district superintendent and the general superintendent had given different reasons for the dismissal of the plaintiff, the one stating that it was for "refusing to answer questions" and the other "for being implicated in a case of theft of fruit from car" and that this was in itself evidence of a wrongful dismissal.

It is not necessary that the master dismissing a servant for good cause should state the ground for such dismissal; and provided good ground existed in fact it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts known subsequently to the dismissal, or on grounds differing from those alleged at the time: 20 *Halsbury* 101, and cases there referred to.

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I think the motion for nonsuit on this branch of the case should have been allowed.

It now remains to be considered if the learned trial Judge was right in withdrawing the claim for libel from the jury.

The alleged libel was contained in what is called the "certificate of service" of the plaintiff. It was compiled from the staff records kept in Winnipeg and showed the positions which the plaintiff had held and the reason for terminating the employment. It contained the entry—"Dismissed for being implicated in a case of theft of fruit from car."

A libel for which civil damages may be recovered must be a "false defamatory statement," for unless the statement be untrue the plaintiff has suffered no injury to his right or reputation, and has no cause of action: 18 *Halsbury,* 608.

Taken as it stands the statement is not necessarily false. The plaintiff was very seriously implicated in a case of theft from a car. He had been found with the stolen goods in his possession, had refused to give any explanation, and had been committed for trial. But the plaintiff seeks to go further and says that the innuendo to be drawn from these words is "that he did participate in stealing fruit from one of the defendant's railway cars in the City of Regina."

The defendant having denied the innuendo laid, it was the duty of the trial Judge to determine whether the words were capable of the meaning alleged in the innuendo; it was for the jury to determine whether that meaning was properly attached to them. *Australian Newspaper Co. v. Bennett* [1894] A.C. 284, 63 L.J.P.C. 105. The trial Judge gave no reasons for withdrawing the case from the jury and assuming he did not do so on the ground that the innuendo laid could not be inferred from the words used, it is necessary to look for other grounds to support his ruling.

The defendants by their pleading set up the further defence that the occasion was privileged and that there was no malice on their part.

I think the occasion was privileged and that the plaintiff upon whom the onus lay failed to show malice. An occasion

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is privileged where the person who makes a communication has an interest or a duty to make it to the person to whom he does make it, and the person to whom he does make it has a corresponding interest or duty to receive it.

The plaintiff relies upon a letter written to Barry, local secretary of his union, enclosing the certificate of service as publication of the libel. This letter was written by the divisional superintendent to Barry about December 10, 1917, some time after the plaintiff's acquittal at the assizes.

Barry as an official of the brotherhood or union had been placed in charge of the plaintiff's appeal to the railway officials against his dismissal. Mien, the general secretary, had also been called upon for assistance. The plaintiff laid all the facts of the case before them and was told there would be a meeting of the committee to consider his appeal at Moose Jaw in December and that he must have his certificate of service available for the meeting.

He called twice for it at the superintendent's office and gave him to understand why he wanted it at once. The document had been delayed in Winnipeg and the plaintiff said he would call once more for it. Before he did so the certificate arrived and knowing the purpose for which it was required and the persons before whom it was to be laid the superintendent not having the plaintiff's address in his office, sent it under cover to Barry. It is now charged that this was not only publication but evidence of malice as well.

That the occasion was privileged was a question for the Judge and I have no doubt he so considered it. Barry and Mien were the plaintiff's advocates. They were concerned at the time in preparing his case for appeal, all of which the superintendent knew. All parties had a mutual concern and interest in the subject of the dismissal and the reasons for it. Barry and Mien knew all the facts and required this very document to complete their case. The occasion has all the requisites of privilege and the action of the superintendent in sending the document to Barry so that it might be in time for the meeting was apparently to expedite the plaintiff's appeal and to assist him in putting his case in order.

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The occasion being privileged the plaintiff has the onus cast upon him of proving malice sufficient to destroy the protection which the privilege afforded.

I can find no evidence of malice whatsoever. The plaintiff's counsel in his able argument alleges two facts upon which he relies. The first is that the ground of dismissal given was not the ground at first alleged by the superintendent which was "dismissed for refusing to answer questions." The ground finally entered in the staff record was given by the general superintendent, who varied the words used by the district superintendent. I can find no evidence of malice in this. The first form of words gave no sufficient indication of the real reason for the dismissal for entry in the record; the general superintendent, noting this, made an entry which gave the requisite information. Then it is said there was evidence of malice in sending the certificate to Barry instead of keeping it in the Regina office until the plaintiff called for it. I take that evidence as showing the very opposite. It was done for the accommodation of the plaintiff and sent to his friends direct to prevent further delay.

After careful consideration and examination of the numerous authorities cited, I am of opinion that the occasion was privileged and was so held by the trial Judge, and that there was no evidence of malice to go to the jury. The learned trial Judge was right on this branch of the case. *Harris v. Thompson,* 13 C.B. 333, at p. 334.

As a result the appeal of the plaintiff should be dismissed with costs and the cross-appeal of the defendants allowed with costs and the action dismissed with costs.

Appeal dismissed with costs; cross-appeal allowed with costs.

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COURT OF APPEAL 1920

REX *v.* ELNICK
REX *v.* CLEMENTS
REX *v.* BURDIE

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Criminal Law—Common Criminal Law of England—Operative Effect in Manitoba—Murder—Act of Violence Causing Death Done in Furtherance of Crime of Violence.

The common criminal law of England of July 15, 1870, is the law of Manitoba save as altered, varied, modified or affected by *The Code* or otherwise by competent legislative authority; it is preserved under *The Code* except in so far as it is thereby expressly or by implication repealed; and it is operative even in cases provided for by *The Code* unless there is such repugnancy as to cause *The Code* to prevail.

An act of violence causing death, done in furtherance of a felonious crime of violence, is murder.

If a person in proceeding to rob another points a loaded firearm at him which unintentionally goes off and kills him, that is murder. Being engaged in the commission of a crime of violence, his intention to discharge the firearm cannot be regarded separately from his intention to commit robbery.

Others engaged in the robbery along with the person causing the death under circumstances as aforesaid were held guilty of murder under sec. 69 of *The Code.*

ARGUED: 17th May, 1920.
DECIDED: 10th June, 1920.

Statement. Stated case submitted to the Court by the Crown upon question of law arising on trials for murder before Mathers, C.J.K.B.

John Allen, for the Crown.
A. C. Campbell, for accused.

The judgment of the Court was delivered by

CAMERON, J.A.—William J. De Forge, a man of 32 or 33 years of age, was in October last, and for some time before that, had been, in business as a storekeeper on the corner of Maryland and Wellington Streets in this city. The defendant Elnick is a young man born in Rumania, who came to this country at the age of 15 and became 21 on January 1st, last. He had been with the Canadian Expeditionary Force in France for four months and was wounded twice. On his re-

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turn to the city after the armistice, he, along with Clements and Burdie, the other defendants, entered upon a systematic career of crime. He admitted that he and Clements had broken into a shop on Portage Avenue and stolen two revolvers. Two nights before the commission of the crime in question Elnick and the two others were returning from St. James and crossing Portage Ave. went along Maryland Street and from the street saw a man counting money. Remarks were passed about the amount of money and it was then and there planned "to hold the man up." The man was De Forge and the next night they went to the place and followed him, but he stopped to talk to some one and they lost track of him. They were also there the next night (this time without Burdie) when nothing happened. On the Thursday afternoon they arranged to meet Friday night for the purpose of holding up the man on Maryland Street. Elnick and Clements left his (Elnick's) room together about eight o'clock, Elnick carrying a five-shooter automatic pistol, which was concealed in a hiding place back of the Venice Café. They then were joined by Burdie at the Triangle Hut, left it about 11 o'clock, went to where the automatic was concealed and got it. Clements suggested that they should have the other two guns and these were obtained by Elnick, who put one (a Luger automatic) in his pocket after assuring himself that the safety catch was up. The three of them then started for Maryland Street which they reached about half-past eleven. Elnick says he told Clements and Burdie that "no matter what happens under no circumstances, no shooting is to be done" to which the others assented. After a while De Forge came along the street to where the three were standing. When he got about eight feet past, Elnick called out "Hands up." De Forge turned to the left, raised his hands and faced Elnick at an angle and, as Elnick says, he said some words and as he was saying them Elnick was holding the Luger automatic in his hand and looking De Forge in the face and he says a shot went off, and that as soon as it went off another followed. Clements and Burdie, who were standing near by, then broke into a run and Elnick followed. Elnick and Clements, who had been wearing handkerchiefs on their faces, threw them aside and subsequently

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concealed the revolver in the attic of the quarters where they lived.

The automatic pistol used was of the type that discharges on the pressure of the trigger almost without interval, but there was a perceptible interval in this case. De Forge fell, struck with a bullet through the chest, and was carried into a neighbouring house where he expired.

The three perpetrators of this crime were subsequently apprehended and brought to trial at the last Winnipeg assizes. The grand jury preferred an indictment for murder against Elnick, Clements and Burdie, who were accordingly tried before the Chief Justice of the King's Bench and a jury. The case against Elnick was the first one disposed of. He gave evidence on his own behalf, was found guilty of manslaughter and sentenced to 25 years in the penitentiary. The other two were subsequently tried, found guilty of manslaughter and sentenced to 15 years each in the penitentiary.

The following extracts are made from the charge of the Chief Justice to the jury in the Elnick case:

He [Elnick] has admitted all the outstanding facts; he has admitted that with Burdie and Clements, they deliberately formed the design of robbing De Forge and that they went to Maryland Street and took up positions where they could observe the movements of their intended victim and he has also admitted that De Forge met his death from a revolver bullet fired from the firearm in his hand, but he says he did not intend to shoot. That makes the issue that you are called upon to decide a very narrow one but at the same time an issue that will require from you the greatest care and deliberation before arriving at a decision.

The act of killing, while in the prosecution of an unlawful design, having been admitted it only remains to enquire whether there was present the intent which would make the killing murder, or whether there was no such intent—in which case the killing would be manslaughter.

* * * * * * *

Culpable homicide on the other hand is criminal and the perpetrator is guilty of either murder or manslaughter. It is murder if the offender means to cause the death of the person killed or if he means to cause the person killed any bodily injury, which he knows is likely to cause death and is reckless whether death ensues or not. It is also murder if the offender for any unlawful object does an act which he knows or ought to have known to be likely to cause death and thereby kills any person, though he may have desired that his object should be effected without hurting anyone or if he inflicts grievous bodily injury for the purpose of facilitating robbery or his flight upon the commission or attempted com-

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mission of robbery and death ensues from the effect of such injury, whether or not he meant death to ensue, or knew that death was likely to ensue.

These are the instances of culpable homicide which amount to murder. Any other culpable homicide which does not fall within these classes amounts to manslaughter.

* * * * * * * * *

In order to reduce the crime to manslaughter it was therefore incumbent to show that he did not intend to fire the shot by which De Forge was killed.

The accused has told you his own story. He admits that with Clements and Burdie he went to the place where the shooting took place on the night in question with the intention of robbing De Forge as he passed along Maryland Street on his way home from his store. He admits that with others he burglarised a dwelling house in search of automatic pistols supposed to be there, that not finding any he and Clements afterwards burglarised a store on Portage Avenue for the express purpose of possessing themselves of the Luger automatic revolver with which the crime was committed. He admits that on the night in question he was armed with this revolver and that Clements and Burdie were also armed. He admits that when De Forge reached a point about five feet past the opening of the lane at the south of the Elsinore Block he pointed his pistol at De Forge and said "Hands up." He admits that De Forge acquiesced and raised his hands; he admits that two shots were fired out of the pistol that was in the hands of one of them hit and almost instantly killed De Forge. He admits that he set the safety catch so that the gun would shoot when the trigger was pressed. But he says he did not intend to fire the pistol at all. That, gentlemen of the jury, is the defence. Now as a matter of law an intent to do one or other of the things that I have enumerated is an essential element in the crime of murder; that is, the accused must have meant either to kill De Forge or to cause him bodily injury which he knew to be likely to cause death or to inflict grievous bodily injury for the purpose of facilitating the robbery or their flight afterwards. And I must tell you that although his hand physically discharged the weapon if his mind did not go with the act the shooting did not amount to murder but to manslaughter only. If he did not intend to fire the gun at all his offence would be manslaughter because if a man while doing an unlawful act kills another although he did not intend to do him any hurt it is manslaughter. That he was unlawfully attempting to commit robbery is admitted so the only real issue you are called upon to decide is the intent with which he fired the gun. If you find that it was intentionally fired there appears to be no alternative but a verdict of guilty of the offence charged. But on the other hand if you find that although his hand physically discharged the weapon his mind did not accompany the act, in short that at the moment he had no intention of discharging it your verdict must be manslaughter only.

* * * * * * * *

Now let me again state that if you find that he intended to fire the shot that killed De Forge you should find him guilty of the crime charged, but

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if you think he had no intention of shooting at all and that in some unexplained way the gun went off your verdict should be one of manslaughter.

It is quite plain that the Chief Justice told the jury that the provisions of the law as set out in subsecs. (*a*), (*b*) and (*d*) of sec. 259 and subsec. (*a*) of sec. 260, were, as applicable to the facts of this case exhaustive of the classes of culpable homicide that constitute murder. "Any other culpable homicide which does not fall within these classes amounts to manslaughter."

The following are the sections:

259. Culpable homicide is murder,—

(*a*) if the offender means to cause the death of the person killed;

(*b*) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

(*d*) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

260. In case of * * * * * robbery * * * culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue,

(*a*) if he means to inflict grievous bodily harm for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury;

The gist of the charge is to be found in the sentence:

And I must tell you that although his hand physically discharged the weapon if his mind did not go with the act the shooting did not amount to murder but to manslaughter.

The jury upon this statement of the law, elected to give credence to Elnick's denial of his intention to kill and brought in a verdict of manslaughter accordingly.

No objection was made by counsel for the Crown to the charge at the trial. Subsequently, however, the Chief Justice was asked by the Crown to state a question for the opinion of this Court as to the accuracy in law of his charge, which he declined to do on grounds which were set out in a statement that was read to the Court only after the argument on this appeal had been proceeding for some time.

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As to the ground that the case was merely academic (inasmuch as the Crown had announced its determination not to ask for a new trial) it is sufficient to point out that it involves matter of the gravest importance in the administration of criminal justice and that the House of Lords, in the case of *Rex v. Beard,* 14 Cr. App. R. 110; 14 Cr. App. R. 159; to which I make reference at length later on, dealt with an appeal by the Crown under somewhat similar circumstances. The Chief Justice further objected to the form of the questions proposed to be stated, and indicated a willingness to sign the cases stated if amended. This was done during the argument by confining the questions as to the correctness of the charges to those portions relating to the law of murder. In the Elnick case the questions submitted by the Crown are therefore as follows:

1. Was my charge to the jury correct as to the law of murder?

2. If it was not correct how should I have charged the jury?

Counsel for the prisoner consented to the amendments and to the hearing and there is no question whatever as to the right, authority and duty of this Court under sec. 1015 of *The Code* to entertain this application. See *Rex v. Blythe,* 19 O.L.R. 386, 15 C.C.C. 224.

Two subjects of the first importance are presented for consideration: (1) Whether the provisions of *The Code* above referred to are exhaustive on the subject of murder so far as therein purporting to be dealt with; and (2) Whether the rule, that one who, in furtherance of a crime of violence such as is disclosed on the evidence in this case takes the life of another, is guilty of murder, prevails in this province.

Sec. 129 of *The B.N.A. Act,* 1867, provides for the continuation of the laws in force in Canada, Nova Scotia and New Brunswick, including criminal laws, both statutory and common law, subject to repeal, abolition and alteration by the proper legislative authority. In the original provinces the English common criminal law was in force as of the dates set

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out in *Burbidge's Digest of the Canadian Criminal Law*, pp. 9-13.

As to Manitoba, prior to July 15, 1870, the common criminal law of England was that as of the date of the Hudson's Bay Company's charter, except as varied by subsequent legislation by the Imperial Parliament and the Council of Assiniboia, as was laid down by the late Chief Justice Wood in the *Lepine Case*. These laws were continued by the provisions of *The B.N.A. Act, The Rupert's Land Act*, ch. 105, 31 & 32 Vict. (Imp.); ch. 3, 32-33 Vict. (Can.); *The Manitoba Act*, ch. 3, 33 Vict. (Can.); and *The B.N.A. Act* of 1871, (Imp.) 34 & 35 Vict., ch. 28; and in 1871, ch. 14 of the Statutes of Canada extended to Manitoba certain criminal laws in force in the other provinces of the Dominion, including the Act, ch. 20 of 1869, respecting offences against the person, including the offences of murder and manslaughter but making no definition of either. Finally in 1888, by 51 Vict., ch. 33, it was enacted that the laws of England relating to matters within the jurisdiction of the Parliament of Canada as the same existed on July 15, 1870, were and are in force in Manitoba in so far as they are applicable and have not been or may not hereafter be repealed, altered, varied, modified or affected by any Act of the Imperial or Dominion Parliaments.

Next comes the enactment of *The Criminal Code* of 1892. In the revision of 1906, secs. 10, 11 and 12 specifically refer to Ontario, British Columbia and Manitoba. Sec. 12, referring to Manitoba, repeats the provision of the Act of 1888 previously quoted. It is thus expressly declared in *The Code* itself that the criminal law of England as it existed on July 15, 1870, in so far as it is applicable to Manitoba, and has not been repealed by any Act of the Parliament of the United Kingdom, or by *The Code*, or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such Act, shall be the criminal law of this province. As this sec. 12 now stands, embodied in *The Code*, it appears to me to have greater significance than formerly, though that greater significance is apparent rather than real. Quite apart from other considerations this section appears to me as conclusive of the question under discussion.

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By sec. 15 of *The Code* it is provided:

15. Where an act or omission constitutes an offence, punishable on summary conviction or on indictment, under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence.

This is an extension of the terms of sec. 933 of the original Act of 1892, in making express mention of the retention of common-law offences.

And by sec. 16 it is further provided:

16. All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith.

Thus it appears from repeated provisions of *The Code* itself the common criminal law of England of July 15, 1870, is the law of this province save as altered, varied, modified or affected by *The Code* or otherwise by competent legislative authority.

This is made clear by the fact that the English Draft Code, upon which our *Code* is largely based contained a clause expressly abrogating the common law with respect to criminal offences. Strong exception was taken by the English Judges to such a provision and the Dominion Parliament in enacting *The Code* left out this clause.

By the provisions of the above section 16 and by the omission of any prohibitory clause such as that inserted in the English Draft Code against proceeding at common law, our own Code preserves the common law not only so far as it affords a *defence* in cases not expressly provided for, but also so far as it may afford a *ground of prosecution* in cases not expressly provided for. [*Crankshaw, Criminal Code* (1915), p. 23.]

Mr. Crankshaw, in the introduction to the first edition of his work (1893), traces the history of *The Code* and says:

It codified both the common and the statutory law relating to criminal matters and criminal procedure; but, while it aimed at superseding the statutory law, it did not abrogate the rules of the common law; these being retained, and left available, whenever necessary, to aid and explain the express provisions of the Code and of statutes remaining unrepealed, or to supply any possible omissions, or to meet any new combination of circumstances that may arise.

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This view is clearly borne out by judicial decisions. In *Reg. v. Union Colliery Co.*, 31 S.C.R. 81, 4 C.C.C. 400, the judgment of the majority of the Supreme Court was delivered by Sedgwick, J., who says at p. 405:

> Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force.

In *Reg. v. Cole*, 5 C.C.C. 330, it was held that the common-law jurisdiction as to crime is still operative, notwithstanding *The Code*, and even in cases provided for by *The Code*, unless there is such repugnancy as to give prevalence to the latter law. See the note appended to the report of this case. In *Brousseau v. Reg.*, 56 S.C.R. 22, 29 C.C.C. 207, the Chief Justice reiterated the opinion of the Court in the *Union Colliery Case, supra*, that the criminal common law of England is still in force in Canada except in so far as repealed either expressly or by implication.

Reference is also made to *Rex v. Graves*, 47 S.C.R. 568, 21 C.C.C. 44. That case was decided upon certain sections of *The Code* and "without determining that the definition contained in them is exhaustive" as pointed out by Mr. Justice Anglin at p. 54.

We can take it, therefore, as settled beyond controversy that in this province the common-law jurisdiction as to criminal offences is still operative and even in cases provided for by *The Code*, unless there is such repugnancy as to cause *The Code* to prevail.

By *The Code*, sec. 14, the distinction between felony and misdemeanour has been abolished and proceedings in respect of all indictable offences are to be conducted in the same manner. The section deals with procedure but for certain purposes the distinction remains.

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In England the act by which death is caused must be attended by the state of mind known as "malice aforethought" in order to constitute the crime of murder. In *Reg. v. Mawgridge,* Kel. 119, Lord Chief Justice Holt defines "malice aforethought" thus, "He that doth a cruel act voluntarily, doth it of malice prepensed" (i.e., aforethought). The words, it has been said repeatedly, are technical and are not used in their ordinary meaning.

> Murder is the unlawful killing, by any person of sound memory and discretion, of any person under the King's peace, with malice aforethought either express or implied by law. This malice aforethought which distinguishes murder from other species of homicide is not limited to particular illwill against the person slain, but means that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit; a heart regardless of social duty and deliberately bent upon mischief. [*Russell on the Law of Crimes,* 655.]

The term "malice aforethought" has been omitted from *The Code.*

Coke in his *Third Institute* says plainly that if unintentional homicide takes place in the doing of an unlawful act it is murder. *Stephen's History of the Criminal Law of England,* vol. 3, p. 57.

A later definition of murder is to be found in *Blackstone's Commentaries,* 1769, vol. 4, p. 201:

> And if one intends to do another felony, and undesignedly kills a man, this is also murder. Thus, if one shoots at A. and misses him, but kills B., this is murder, because of the previous felonious intent, which the law transfers from one to the other.

It is laid down in *East, Pleas of the Crown,* vol. 1, p. 255, (1806):

> And first it is principally to be observed that if the act on which death ensue be *malum in se,* it will be murder or manslaughter according to the circumstances; if done in prosecution of a felonious intent, however, the death ensued against or beside the intent of the party, it will be murder.

Chitty on Criminal Law, ed. of 1826, p. 729, says:

> When death ensues in the pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter, as the intended offence is felony or only a misdemeanour, Fost. 258. Thus if a man shoot at the poultry of another with intent merely to kill them, which is only a trespass, and slay a man by accident, it will be manslaughter; but if he intended to steal them when dead, which is felony, he will be guilty of murder, Kel. 117, Fost. 258. So where the party shoots at one man

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and kills another, malice will be implied as to the latter; and the felonious intent is transferred, on the same ground, where poison is laid to destroy one person and is taken by another, 1 Hale 466.

I would refer also to the views of Sir Michael Foster (1762) as summarized by *Stephen's History of the Criminal Law of England,* vol. 3, p. 76.

Death caused by the unintentional infliction of personal injury is *per infortunium* if the act done was lawful and was done with due caution, or was accompanied only by slight negligence. If it was accompanied by culpable negligence, the act is manslaughter. If it was accmpanied by circumstances showing a heart regardless of social duty and fatally bent upon mischief, or if the intent is felonious, it is murder.

In *Reg. v. Franz* (1861) 2 F. & F. 580, Blackburn, J. told the jury:

As a matter of law, if you are satisfied that when the deceased met her death from violence by any person or persons to enable them to commit a burglary (or any other felony) although those who inflicted that degree of violence might not have intended to kill her (probably you think so here and merely to stop her outcry in calling for assistance) all who are parties to that violence are guilty of murder.

In *Reg. v. Horsey* (1862) 3 F. & F. 287, the prisoner was indicted for murder for having set fire to a stack of straw close to a barn and the deceased had been burnt to death as a consequence. Lord Bramwell told the jury

that the law was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder even though he did not intend it. And though [he said] that may appear unreasonable, yet as it is laid down as law, it is our duty to act upon it.

There is a long foot-note to the report of this case, in which the writer criticizes Lord Bramwell's direction which has in its turn been the subject of criticism. See the remarks on the argument in *Rex v. Beard,* 2nd day, p. 63.

In *Reg. v. Desmond, Barrett et al* (1868) referred to in *Burbidge's Digest of the Canadian Criminal Law,* Lord Chief Justice Cockburn said (p. 218):

If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to take life, yet if it were such that life was necessarily endangered by it—if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it [that was murder.]

And further, in citing the oft-quoted illustration used by *Foster,* "A shoots at a domestic fowl, intending to steal it,

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and accidentally kills B, A commits murder;" the author says this doctrine (which is supported by many other authorities) was followed by Lord Chief Justice Cockburn in *Barrett's Case*. He said:

> If a person seeking to commit a felony should in the prosecution of that purpose cause, although it might be unintentionally, the death of another, that, by the law of England, was murder. There were persons who thought and maintained that where death thus occurred, not being the immediate purpose of the person causing the death, it was a harsh law which made the act murder. But the Court and jury were sitting there to administer law, not to make or mould it, and the law was what he told them.

This is a re-statement of what was said by Lord Bramwell in the *Horsey Case*, and is, beyond question, an authoritative declaration of the law of England on this subject as it stood on July 15, 1870.

We are now brought down to a modification or narrowing of the law introduced in *Reg. v. Serne* (1887) 16 Cox C.C. 311, where Mr. Justice Stephen charged the jury in a case in which the prisoners were indicted for the murder of a boy, it being alleged that they wilfully set fire to a shop by which act the death of the boy had been caused. The boy was an imbecile son of one of the prisoners whose life had been insured; the stock and furniture in the shop had been heavily insured. In his charge Mr. Justice Stephen refers to the old illustration of a man shooting at a fowl with intent to steal it, and accidentally killing a man, and expresses a doubt whether that is really the law. He goes on to say:

> I think that, instead of saying that any act done with intent to commit a felony and which caused death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that everyone would say in a case like that, that when a person began doing wicked acts for his own base purposes, he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That I take to be the true meaning of the law on the subject. In the present case, gentlemen, you have a man sleeping in a house with his wife, his

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two daughters, his two sons, and a servant, and you are asked to believe that this man, with all these people under his protection, deliberately set fire to the house in three or four different places, and thereby burnt two of them to death. It is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that if that were really done, it matters very little indeed whether the prisoners hoped the people would escape or whether they did not. If a person chose, for some wicked purpose of his own to sink a boat at sea, and thereby caused the deaths of the occupants, it matters nothing whether at the time of committing the act he hoped that the people would be picked up by a passing vessel. He is as much guilty of murder, if the people are drowned, as if he had flung every person into the water with his own hand. Therefore, gentlemen, if Serne and Goldfinch set fire to this house when the family were in it, and if the boys were by that act stifled or burnt to death, then the prisoners are as much guilty of murder as if they had stabbed the children. I will also add, for my own part, that I think in so saying, the law of England lays down a rule of broad, plain, common sense.

This modification of the former rule seems to have been generally, though not universally, adopted in England. See the note in 9 *Halsbury,* p. 579; also *Roscoe's Criminal Evidence,* 13th ed. 618. But Mr. Justice Stephen's statement of the law would be decisive against the prisoner Elnick in this case.

The prisoner must take the consequences if he goes further than he intended when he began,

and that is a rule of broad, plain common sense. But on the argument in *Rex v. Beard,* referred to hereafter, Lord Sumner states that in reading Mr. Justice Stephen it is very difficult to tell when he is laying down the law that previous authorities have laid down and when he is frankly laying down what he thinks should be the law. (Notes, p. 76).

A recent statement of the law is to be found in *Archbold's Criminal Pleading, Evidence and Practice,* 25th ed., p. 852 (1918):

If a person, whilst doing or attempting to do another act, undesignedly kills a man—if the act intended or attempted were a felony, the killing is murder; if unlawful, but not amounting to felony, the killing is manslaughter.

I wish to point out a significant statement made by Lord Atkinson on the argument in the *Beard Case* (1st day, p. 102).

All the prosecutor has to do in murder is to prove that the accused killed the man. Then the law presumes that he did it of malice aforethought.

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Lord Atkinson, earlier on the same day, at p. 77, remarked:

> If in the commission of a felony you do an act not intended to kill and which does kill it is murder.

It is worthy of notice that the definition in *The Code*, sec. 262, "Culpable homicide, not amounting to murder, is manslaughter" is not restricted to "murder as defined by this Act"; thus it makes culpable homicide manslaughter only when it is not murder either by common law or under *The Code*.

It was pointed out that Elnick was guilty of an offence against sec. 122 of *The Code* in pointing a fire arm.

There is a class of cases dealing with death resulting from attempted abortion, such as *Reg. v. Whitmarsh*, 62 J.P. 711, and *Reg. v. Lumley*, 76 J.P. 208, 22 Cox C.C. 635, where it has been laid down that a jury may find a verdict of manslaughter if the death is so remote a contingency that no reasonable man would have taken it into his consideration. But this "extraordinary view," as it has been called, is confined to cases of abortion. The reason assigned for it is that in such cases the woman, whose death is caused, has voluntarily submitted to a felonious act for the purpose of procuring abortion. See remarks of the Attorney-General in *Rex v. Beard*, Notes of argument, 1st day, p. 92. It may be doubted whether the reasoning of the Attorney-General is convincing on the point. In *Reg. v. Radalyski*, 24 V.L.R. 687, also a case of death during an attempted abortion, Madden, C.J. held it the rule

> that if a person while endeavouring to commit a felony by some means or other kills another person he is responsible for the murder.

It may well be questioned whether the direction to the juries in the *Whitmarsh* and *Lumley Cases, supra*, would now be followed, in view of the decision of the Court of Criminal Appeal and the House of Lords in *Rex v. Beard*, 14 Cr. App. R. 110; 14 Cr. App. R. 159. However that may be, it is absolutely clear that the ruling in abortion cases has no application whatever to cases such as that now before us.

In the recent case of *Rex v. Beard*, decided by the House of Lords, on appeal from the Court of Criminal Appeal, on March 5 last, we have an authoritative and illuminating exposition of the law. The judgment was given by the Lord

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Chancellor. The case is reported in the Court of Criminal Appeal, though not yet in the House of Lords, but we have been furnished with copies of the judgment and argument. The prisoner was convicted at the Chester Assizes of murder and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of 20 years of penal servitude. On July 25, 1919, about 6 p.m. a girl of 13 years was sent to make a small purchase. She was seen to enter the mill where Beard was night watchman. He proceeded to ravish her and when she struggled, placed his hand over her mouth, and his thumb on her throat, causing her death by suffocation. There was some, but not much evidence that the prisoner was under the influence of intoxicating liquor at the time. The prisoner was not called at the trial but statements made by him were introduced into evidence. He stated he had a struggle with the girl, and seemed to "lose his senses" and that he would not have injured her had he not been "sodden and mad with drink." The only defence presented was that there was no intention on the part of the prisoner to cause the girl's death and, therefore, the verdict should be manslaughter and not murder, and that the case came within *Rex v. Meade* (No. 2) [1909] 1 K.B. 895, 78 L.J.K.B. 476. The Lord Chancellor sets out the direction of Mr. Justice Bailache to the jury to which objection was taken. In the Court of Criminal Appeal two separate points of misdirection were raised: (1) That the learned Judge should have told the jury that if they were of opinion that the violent act which was the immediate cause of death was not intentional but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter; and (2) That the learned Judge wrongly directed the jury as to the defence of drunkenness and gave a direction which was not in accordance with the decision in *Meade's Case, supra,* and was applicable only to the defence of insanity.

As to the second ground that, though of vital importance, is of no application here. But as to the first ground the Lord Chancellor says that the Court of Criminal Appeal held

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that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law, and there can be no doubt as to its soundness.

In the Court of Criminal Appeal Lord Chief Justice Reading described the struggle made by the child to escape the prisoner who eventually did the act which resulted in her death and says:

By the law of England that is murder; it is an act of violence done in the course or furtherance of a felony involving violence, and beyond all question and beyond the range of any controversy that is murder. [14 Cr. App. R. 116.]

After discussing at length the law relating to the defence of drunkenness, the Lord Chancellor examines the decision in the *Meade Case, supra* and proceeds to say of it that there

the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In this [Beard's] case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's Case,* therefore, it was essential to prove the specific intent: in *Beard's Case* it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape.

And further he says:

For in the present case the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. These acts cannot be regarded separately and independently of each other. The capacity of the mind of the prisoner to form the felonious intent which murder involves is, in other words, to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment.

And finally, after expressing a doubt whether there was any sufficient evidence to go to the jury that the prisoner was drunk, he says:

There was certainly no evidence that he was too drunk to form the intent of committing rape. In these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder.

Lord Buckmaster, the Lord Chief Justice, Viscount Haldane, Lord Dunedin, Lord Sumner, Lord Atkinson and Lord Phillimore concurred in the judgment of the Lord Chancellor. It is to be noted that before the judgment was delivered it was officially stated that the sentence of the prisoner had been re-

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spited. Nevertheless the judgment of the House of Lords was that the appeal should be allowed and the conviction of murder be restored.

This view of the law, sanctioned by the most eminent authority and founded on precedent and common sense, is directly applicable to the case of Elnick before us. On the undisputed facts the death of De Forge was caused by an act of violence done by Elnick in furtherance of a robbery which is itself a crime of violence. Such a killing is murder according to our law. The Chief Justice, therefore, misdirected the jury in telling them that

> although his [Elnick's] hand physically discharged the weapon, if his mind did not go with the act the shooting did not amount to murder but to manslaughter only. If he did not intend to fire the gun at all his offence would be manslaughter because if a man while doing an unlawful act kills another although he did not intend to do him any hurt, it is manslaughter only.

and in the other passages in his charge to the same effect. This is clearly an erroneous statement of the law. Elnick was engaged in the commission of a crime of violence and his intention to discharge the revolver cannot be regarded separately from his avowed intention to commit robbery. To ascertain his mind as to the former, it must be explored as to his intention to commit the robbery of which there is no doubt whatever. The jury should have been told that on the undisputed and admitted facts the killing of De Forge was caused by an act of violence done by Elnick in furtherance of a crime of violence, that the killing was therefore murder and that it was their duty to return a verdict of guilty.

The questions submitted should be answered accordingly.

In the cases of Clements and Burdie precisely the same considerations apply as in that of Elnick. Under sec. 69 of *The Code* these men were as responsible for the killing of De Forge as if they themselves had done that which Elnick did which resulted in his death. The answers to the questions in these cases, identical with those in the Elnick case, should be in accordance with the foregoing.

Judgment accordingly.

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COURT OF APPEAL.

REX *v.* LACHANCE

Before PERDUE, C.J.M., CAMERON, HAGGART and DENNISTOUN, JJ.A.

Criminal Law—Amending Conviction of Magistrate—Several Offences Charged, One Not Proven—Reduction of Penalty—The Manitoba Temperance Act.

Where there were six offences charged under *The Manitoba Temperance Act* and it was apparent that the magistrate found the accused guilty of all and imposed the minimum penalty of $50 in respect to each, amounting to $300 in all, and the Court found there was no evidence to support the conviction for one of the offences, it amended the conviction and reduced the penalty to $250.

Intoxicating Liquors—The Manitoba Temperance Act — Unlawful Prescribing of Liquor—Prescription in Blank—Prescription of "Scotch."

A signed prescription given by a physician in blank to be filled in with "gin, rye or Scotch" whichever might happen to be in stock when presented at the drug store, is a prescription for intoxicating liquor for which the physician may be liable under sec. 57 of *The Manitoba Temperance Act.*

A prescription for "40 oz. of Scotch," where the evidence makes it clear that intoxicating liquor was what the applicant required and the physician giving the prescription had in mind, will be assumed by the Court to be for intoxicating liquor. The Court may take judicial notice that the word "Scotch" when used in such connection means "Scotch whiskey," a liquor which is intoxicating.

ARGUED: 11th May, 1920.
DECIDED: 10th June, 1920.

Statement. APPLICATION for *certiorari* and to quash a conviction under *The Manitoba Temperance Act.* Order made for *certiorari.* Conviction confirmed with amendment.

John Allen, for Crown.
M. G. Macneil, for applicant.

PERDUE, C.J.M. and CAMERON, J.A. concur.

HAGGART, J.A.—I agree with the observations made by the magistrate Mr. Noble, when he says, after the conclusion of the case:

This has been one of the most flagrant cases of dealing with prescriptions that has come before me and if the evidence before me is any indication of the whole business of the Doctor in reference to prescriptions for liquor, it could not possibly be more flagrant. Whatever we think of the Act, 95% of the Profession try to live up to the law. It is a noble profession. I have friends in the Medical Profession who are very in-

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censed at the way things are going on. I find the accused guilty and order him to pay a fine of $300 and costs or four months in jail.

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There is a serious question as to whether there is sufficient evidence to convict on all the charges included in the information and I agree with the suggestion of my brother Dennistoun that the conviction be amended so as to exclude the case where the evidence is not sufficient; in which case the fine or penalty would be reduced to the extent of $50. In the information there are six offences charged so that instead of making it a fine or penalty of $300 justice would be done by amending the conviction and making the penalty $250. In fact counsel for the Crown practically admits there is not sufficient evidence to support the conviction for the offence charged as having taken place on December 21, 1919.

There is a question as to whether the expression "Scotch" is a sufficient charge that intoxicating liquor was prescribed on the dates mentioned. I think the language is sufficient to cover the charge. I would hold that "Scotch" is intoxicating liquor.

The application for the *certiorari* should be granted and the conviction should be amended so as to make the penalty $250.

DENNISTOUN, J.A.—This is an application for *certiorari* and to quash a conviction under *The Manitoba Temperance Act*, 1916, ch. 112.

The information charges that the accused

on or about the 21st day of December, 1919, and on the 9th, 13th, 17th, and 19th days of February, 1920, at Winnipeg and St. Boniface in the Province of Manitoba, unlawfully did being a Physician lawfully and regularly engaged in the practice of his profession, give prescriptions for intoxicacating liquor in cases where there was no actual need, in violation of and contrary to the provisions of *The Manitoba Temperance Act.*

Evidence was given in respect to two offences on February 19th.

The conviction follows the wording of the information and imposes a fine of $300 with $9.50 costs with four months imprisonment in default of payment.

Counsel for the accused stated that he relied on the judgment of this Court in *Rex v. Ritchie, ante*, p. 297, and asked that the conviction be quashed, but that case is clearly distinguishable from the case at bar.

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In the *Ritchie Case* this Court found it impossible to amend the conviction which was clearly defective for the reason that the minimum penalty of $50 only having been awarded in respect to three offences charged, it was impossible to determine upon the conflicting evidence adduced which offence the magistrate had in mind when he made his adjudication.

In the present case there are six offences and it is apparent the magistrate found the accused guilty of all of them and imposed the minimum penalty of $50 in respect to each, amounting to $300 in all. The Court has no difficulty in examining the sufficiency of the evidence as applicable to each offence nor in amending the conviction in respect to any or all of such offences if deemed advisable to do so.

Counsel for the Crown admits there is no evidence to support the conviction for December 21, 1919. The conviction should be amended accordingly, the finding in respect to that date struck out and the penalty reduced to $250.

The offences of February 9 and 13, are very clear cases of giving prescriptions "for which there was no actual need" and are quite different from the cases referred to by my brother Fullerton in the *Ritchie Case, supra.* In the present case the applicants never saw the physician at all, but obtained prescriptions from the physician's clerk who had a supply on hand signed by the doctor which she issued at $1 each to the applicants.

The accused admitted on cross-examination that as many as a dozen had been furnished to an applicant at one time upon his statement that they were wanted for friends who were ill.

When a physician gives trustworthy evidence that he prescribed liquor for a person who, in his opinion, had need of it after a personal examination of the patient, I agree that it is difficult for a Court to convict him, but there is no difficulty in respect to the cases of February 9 and 13, for the doctor never saw the patients at all, and moreover, there was in respect to all these charges such an open disregard of both the spirit and the letter of the law as to justify the magistrate in disregarding the evidence of the accused in respect to the

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charges laid for February 17 and 19, to the effect that one man said he was "a little nervous" and the other said he "did not feel very well."

The doctor was called as a witness in his own behalf but he does not say that, in his opinion, there was any need for a prescription for intoxicating liquor in any of the cases referred to, and the witnesses for the prosecution make it clear that they disclosed no case of need to the physician.

It only remains to deal briefly with the second case on February 19, in which the accused gave a man a signed prescription with a blank to be filled in with "gin, rye or Scotch," whichever might happen to be in stock when presented at the drug store. It is argued this was not a prescription for intoxicating liquor as no liquor was mentioned in it. To so hold would open a wide door to violations of the Act and I agree with the finding of the magistrate that this was a contravention of the statute, sec. 57, and was a prescription for intoxicating liquor issued when there was no actual need and without any exercise of judgment on the part of the physician as to its use being necessary.

The remaining prescriptions called for "40 oz. of Scotch" and objection was taken that in the absence of evidence the Court should not assume that intoxicating liquor within the definition given in the Act was prescribed.

A perusal of the evidence makes it clear that intoxicating liquor was what the applicants required and what the accused and his clerk had in mind when the prescriptions were issued, and a Court which is familiar with cases of this character and the language in common use by persons who are dealing in intoxicating liquors, may take judicial notice that the word "Scotch" when used in such connection means "Scotch Whiskey," a liquor which is intoxicating within the meaning of the statute. *Murray's Dictionary* gives as one of the meanings of "Scotch"—"Often eliptically, e.g., for Scotch Whiskey," and *Webster* defines "Whiskey" as "an intoxicating liquor distilled from grain."

In *Rex v. Scaynetti*, 34 O.L.R. 373, 9 O.W.N. 13, 25 C.C. C. 40, Mr. Justice Middleton held that a magistrate might

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take judicial notice that beer is both a spirituous and a malt liquor and consequently included in the definition of "liquor" given by the Ontario *Liquor License Act;* and it was unnecessary to take evidence as to whether or not it contained more than two and a half per cent of proof spirits.

I adopt his reasoning as applicable to this case.

In the result an order for *certiorari* will issue, the conviction will be amended by striking out the words "on or about the 21st day of December 1919, and" in the fifth and sixth lines thereof and by striking out the penalty of $300 therein awarded and substituting $250 therefor and that otherwise the said conviction be sustained and confirmed. *Vide* sec. 101, *The Manitoba Temperance Act,* 1916, 6 Geo. V., ch. 112.

There will be no order as to costs.

Conviction confirmed with amendment.

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COURT OF APPEAL 1920

BUFFET *v.* WALLER AND LAZARNICK

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Agency—Sale of Real Estate—Different Agents Dealing with Purchaser—"Efficient Cause of Sale."

If an agent has really brought about the relation of buyer and seller he is entitled to commission although the actual sale has not been effected by him.

In a dispute as to which of two real-estate agents was entitled to the commission on a sale, the one who first through his advertisement attracted and interviewed the purchaser and directed him to the owner was held to be the efficient cause of the sale and entitled to the commission rather than the other who subsequently discussed the property with the purchaser and whose agent first showed it to him. (Fullerton, J.A. dissented).

ARGUED: 27th April, 1920.
DECIDED: 11th May, 1920.

Statement.

APPEAL from a judgment of Prud'homme, C.C.J. in favour of plaintiff in an action for commission for the sale of defendant Waller's farm. Appeal dismissed with costs, Fullerton, J.A. dissenting.

H. M. Hannesson, for defendants, appellants.

L. P. Roy, for plaintiff, respondent.

PERDUE, C.J.M.—This is an appeal from the County Court of St. Boniface. The plaintiff sues to recover commission on the sale of defendant's farm. Another real-estate agent, Lazarnick, claimed that he had brought about the sale and earned the commission. Defendant was willing to pay the commission to the party entitled. Lazarnick was added as a third party and the contest is between the plaintiff and him. The amount of commission was admitted to be $250. His Honour Judge Prud'homme, before whom the case was heard, found in favour of the plaintiff.

The evidence shows that Waller had instructed the plaintiff to sell the property, consisting of a farm and a considerable quantity of stock and implements, giving him full particulars of the same. The plaintiff advertised the property for sale and by means of this advertisement it came to the attention of one F. Chaput, living at Letellier, who saw the plaintiff and

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obtained particulars from him. The plaintiff told Chaput to see Waller and deal directly with him. Chaput examined other properties and not finding any to suit him he returned to Winnipeg with the intention of seeing the plaintiff. Before doing so, however, he visited Lazarnick's office in order to see him about some lands he was offering for sale and which adjoined Waller's farm. At the interview Waller's farm was mentioned and Lazarnick offered to take him to Ste. Anne where the lands were, intimating that he, Lazarnick, could arrange a sale of Waller's farm on terms suitable to Chaput. On the following day Lazarnick told him that the Waller farm was under option to the Soldiers' Settlement Board and that Chaput could not get that property. Lazarnick told Chaput to go to Ste. Anne and arrange a purchase of the other property from the owner, Desautels. On going to Ste. Anne, Desautels showed him his land and also, at Chaput's request, took him to see Waller's farm. Desautels was anxious to sell his own property and made no effort to sell Waller's. Chaput went back alone the same day to Waller's farm and examined it and the stock. In the evening of the same day he saw Waller and the two came to an agreement. The terms of sale were reduced to writing and signed and were afterwards carried out.

Lazarnick claims that Desautels was his agent and that it was through his own and his agent's efforts that the sale was effected. I think the trial Judge took the right view that it was the plaintiff who first brought Waller's farm to the attention of the purchaser Chaput and got him interested in it. Lazarnick in fact told Chaput that the farm was under option to the Soldiers' Settlement Board and discouraged him from attempting to buy it. It was Chaput's own idea to go to Waller, find that he was free to sell the farm and then himself arrange the terms of purchase

If the relation of buyer and seller is really brought about by the act of the agent he is entitled to commission although the actual sale has not been effected by him:

per Erle, C.J. in *Green v. Bartlett,* 14 C.B. (N.S.) 681, 32 L.J.C.P. 261, quoted with approval in *Burchell v. Gowrie and*

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Blockhouse Collieries [1910] A.C. 614, at p. 624, 80 L.J. P.C. 41.

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PERDUE, C.J.M.

I think it was the act of the plaintiff that was the *causa causans* of the sale.

The appeal should be dismissed with costs.

CAMERON, J.A.—The land in question was listed by Waller, the owner, with the plaintiff, a real-estate agent, for sale, about August 1, by letter (Ex. 1) in which the cash to be paid on the purchase-price was fixed at $2,000. It was accordingly advertised by the plaintiff in several papers in August and September, and in the advertisements the same amount of cash required on the purchase was stated. The first inquiry the plaintiff received was from A. Chaput in a letter, dated August 24, in which reference is made to the plaintiff's advertisement in *The Tribune*. Flavien Chaput, brother of A. Chaput, came in to see plaintiff some time in the first three weeks in September and told him his brother had written to him (plaintiff) and that he (Chaput) was looking for a farm. Plaintiff gave him all the particulars and showed him Waller's letter and told him, as Waller was anxious to sell, he (F. Chaput) could go over to see him and make his own deal with him. F. Chaput told the plaintiff he would consider the matter and very likely go to Ste. Anne.

F. Chaput bought the property between October 15 and 20. He had his information about it originally from his brother and came to Winnipeg to see plaintiff and got the particulars of the farm from him, as well as the name of the owner. F. Chaput did not go to Ste. Anne immediately but inspected other properties at Rainy River and elsewhere. Returning, his wife urged him to take action and he then went to Winnipeg to see the plaintiff. In the meantime his brother had been corresponding with Lazarnick about properties he had for sale, lots 68 and 69, Ste. Anne. Accordingly he went to see Lazarnick when he met him for the first time. F. Chaput does not remember whether it was Lazarnick or himself that first spoke of Waller's farm. He told him he had not cash enough as he thought Waller wanted cash for his stock and farm. He told Lazarnick he had not more than $2,000 cash. Lazarnick

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CAMERON, J.A.

said he would take him to Ste. Anne on the following day and that "he could have Waller do business for $2,000." Lazarnick told him the next day that the Soldiers' Settlement Board had an option on the property and that he (Chaput) could not look for it for sale. Then Chaput was put in telephone communication with one Desautels of Ste. Anne, who proposed to sell Chaput his (Desautels') farm and Chaput arranged to go down to see him the next day. Instead, having met another possible vendor, he went to Isle des Chenes, but finding the land there unsuitable walked to Ste. Anne, found Desautels, who drove him to lots 68 and 69, and he says, "at my request took me out to lot 67 [Waller's property]." He just saw the buildings on the farm but did not see Waller, who was in Winnipeg. Desautels did not seem anxious to sell Waller's farm. After a period of indecision, Chaput went over Waller's property himself and made up his mind to wait and see Waller, which he did that evening. After some discussion with Waller and his wife, Chaput decided to buy and made a bargain and paid $100. In a few days the transaction was formally completed. On cross-examination Chaput says he does not think Lazarnick told him the name of Waller, that Lazarnick did not give him all the particulars, and did not show him a letter. The reason he went to Lazarnick's office was to see about lots 68 and 69.

Chaput did not know Desautels was Lazarnick's agent. It was the elder Desautels that advised him to buy Waller's place.

Now that is the evidence for the plaintiff and on it he is clearly entitled to succeed. There is, however, to be considered the evidence of Lazarnick and of the witnesses called on his behalf. After perusing it and the evidence given in rebuttal by F. Chaput, I still retain the view that the plaintiff had made out his case. It seems to me clearly established that the plaintiff was the efficient cause, or *causa causans*, or procuring agent, of the sale to Chaput. I think the trial Judge was right in the conclusion at which he arrived. The intervention of Lazarnick in the matter complicates the circumstances, but throughout them there is the outstanding fact that the plaintiff brought the purchaser and vendor together and was the cause of the negotiations which ultimately resulted in the sale.

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HAGGART, J.A.

I think the appeal must be dismissed.

HAGGART, J.A.—I would not disturb the finding of the trial Judge. I would dismiss the appeal.

I adopt the reasons given in detail by the Chief Justice and Mr. Justice Cameron.

FULLERTON, J.A. (dissenting)—At the trial this action developed into an issue between the plaintiff and the defendant Lazarnick as to which of them was entitled to receive the commission payable by the defendant Waller.

Both the plaintiff and Lazarnick are real-estate agents doing business in the City of Winnipeg.

There is little if any material conflict of evidence—the difficulty, if any, is to apply the law to the facts of the case.

Prior to October 10, 1919, the defendant Waller was the owner of part of lot 67, Ste. Anne, containing about 114 acres.

In August, 1919, Waller listed the property for sale with the plaintiff. Plaintiff advertised it in *The Tribune, Free Press* and in *La Liberté.*

Arthur Chaput, a brother of Flavien Chaput, who subsequently became the purchaser of the property, on August 24, 1919, wrote to plaintiff asking for a description of the land advertised for sale at Ste. Anne. Some time during the first three weeks in September, Flavien Chaput called at the office of the plaintiff. Plaintiff gave him all the particulars of the farm, also the name of the owner, told him that the owner was very anxious to sell, and suggested that he should see him and make his own deal with him. Chaput said he would consider it. Plaintiff did nothing further in the matter.

The defendant Lazarnick had a sub-agent named Desautels living at Ste. Anne. About July 5, 1919, Lazarnick was advised by Desautels that Waller's farm was for sale. He advertised it and got a party interested and together they went to Ste. Anne and saw Waller. Two or three days later Waller came to Lazarnick's office to close the deal, but as the party could not furnish sufficient cash the deal fell through. This was about the last of July. Lazarnick says that on that occasion he asked Waller whether he should keep on trying to get

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a buyer for him and Waller replied to go ahead as he was willing to sell the property, provided he could get a substantial cash payment on the price quoted.

On October 8, Flavien Chaput came to Lazarnick's office and a conversation took place respecting the 114 acres of lot 67, Ste. Anne belonging to Waller. Chaput said that his brother Arthur "had spoken to him about it [the 114 acres] but that the first cash payment was too much." Chaput said he could only put up $2,000 in cash. Lazarnick told him that if he would come back the next day he would get Waller on the phone in the meantime and see what could be done. After Chaput left his office Lazarnick got Waller on the phone and told him he had a man who was willing to buy his place. Waller explained to him that the Soldiers' Settlement Board had an option on the place, but that the option would expire on October 15 and that he did not think the Soldiers' Settlement Board meant business. Waller asked how much money the man had, what nationality he was, whether he was married or single and what price he had quoted him. Lazarnick informed Waller that he had quoted his own price $40 an acre, that the man was willing to pay $2,000 cash, that his name was Chaput, a Frenchman, and that he was married and had children. Waller replied:

Alright, send him down as I am sure we can do business, and I am practically certain the Soldiers' Settlement Board will not take the farm.

Chaput came to Lazarnick's office the next day, and Lazarnick then told him that as long as he could pay $2,000 cash and the Soldiers' Settlement Board gave up the place, he could buy the farm at $2,000 cash and the balance arranged. Lazarnick suggested to Chaput that he should go down to Ste. Anne and see his man Desautels, who also had a place for sale, his own farm, and that he probably could buy Mr. Desautels' place if it was impossible to get Waller's. Chaput said he would go down. While they were talking Desautels called Lazarnick by phone. Lazarnick said to Dasautels to watch out for Mr. Chaput that evening, meet him at the train and take him down to see Mr. Waller's place, his own place, and if no arrangement could be made for either of these places to try and get him a small farm in that district.

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FULLERTON, J.A.

Chaput went to Ste. Anne the night of October 10, 1919, stayed with Desautels over night and together they visited the Waller farm the next day. Waller was away but returned that night when the sale was closed.

Chaput, who was called as a witness on behalf of the plaintiff, corroborates Lazarnick's story in all material particulars. It is true he says that Lazarnick told him at their second interview that the Soldiers' Settlement Board had an option on the property and that "he could not sell it any more; I could not look for the property any more." Now Waller completely corroborates Lazarnick as to their conversation on the telephone on October 8 above detailed. He says he told Lazarnick that his land was under option but he expected to know in a few days. It is very unlikely that Lazarnick under such circumstances would tell Chaput that "He could not look for the property any more." The fact is that Chaput learned on his arrival at Ste. Anne that the Soldiers' Settlement Board had abandoned the option.

Chaput also stated that Desautels did not appear anxious to show him the Waller farm, but was eager to sell him his own. This, however, has no bearing on the question. We have the fact that Waller listed the land with Lazarnick for sale, that Chaput came to Lazarnick, who called this land to his attention, arranged with him to visit the land, and a sale resulted. Clearly Lazarnick would be entitled to recover his commission from Waller.

Now, as to Buffet's position. True he also had the land listed, advertised it for sale and Chaput, seeing his advertisement, visited him and got all the particulars including the name of the owner Waller. Buffet, however, never communicated the fact to Waller or took any steps whatever to bring about a sale. When Waller sold he only knew Lazarnick in the matter. Lazarnick did not know that Buffet had anything to do with the matter. How then could Buffet ever recover a commission from Waller? I am clearly of opinion that Lazarnick is entitled to recover the commission.

I would allow the appeal with costs.

DENNISTOUN, J.A. concurred with Perdue, C.J.M.

Appeal dismissed with costs, Fullerton, J.A. dissenting.

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COURT OF APPEAL

IN RE EARLY CLOSING BY-LAW
IN RE PERLEY

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Municipal Corporations—By-Laws—Validity—Early Closing of Shops—Discrimination—Reasonableness.

Municipal by-laws regulating the early closing of shops, though in operation they may affect unfairly some classes of shops, should not for that reason be declared invalid if the by-laws are fully within the powers conferred by statute.

The Shops Regulation Act, R.S.M., 1913, ch. 180, provided that any municipal council might by by-law require that all or any classes of shops within the municipality should be closed at certain hours but excepted places where the only trade or business carried on was one of certain specified trades. It also authorized the council to make regulations as to the classification of shops. A by-law of the city of Winnipeg provided that all classes of shops within the city where goods were sold by retail should be closed at certain hours except shops where the only trade or business carried on was one of certain specified trades, to accord with the aforesaid statute, and with regard to these excepted trades it was provided that the by-law should not be held to apply merely because bread, butter or milk was sold or offered for sale therein.

Held (*per curiam*, Fullerton, J. dissenting) the by-law was not *ultra vires* even though it resulted in discrimination in favour of the excepted trades who were thus allowed to sell bread, butter or milk at hours in which others selling these could not do so.

If a municipal council in passing a by-law has acted strictly within the powers conferred upon it by the Legislature the reasonableness of the by-law is not examinable by the Court (Per Perdue, C.J.M. and Cameron, J.A.).

Whether or not a municipal by-law is unreasonable is a question which should be decided on an application to quash rather than on a motion to set aside a conviction (Per Cameron, J.A.).

ARGUED: 22nd April, 1920.
DECIDED: 11th May, 1920.

Statement. STATED CASE by Sir Hugh John Macdonald, police magistrate of Winnipeg, as to the validity of a conviction for violation of a by-law relating to the early closing of shops.

J. Campbell, K.C., and *J. Preudhomme*, for city of Winnipeg and police magistrate.

R. A. Bonnar, K.C. and *W. H. Trueman, K.C.*, for Perley.

PERDUE, C.J.M.—This is a case stated by Sir Hugh John Macdonald, police magistrate, under *The Criminal Code* and

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Judgment.

PERDUE, C.J.M.

The Summary Convictions Act, R.S.M., 1913, ch. 189. The above-named H. W. Perley was convicted on Thursday, November 28, 1918, for that he

did unlawfully omit to close and keep closed his shop in the City of Winnipeg, where goods are offered and exposed for sale between the hours of 6 o'clock in the afternoon on said date and 5 o'clock in the morning of the next following day, contrary to the provisions of By-Law 1853 and amendments thereto of the City of Winnipeg.

The validity of the above by-law as it originally stood was upheld in *Stark v. Schuster,* 14 Man. R. 672.

On November 14, 1918, by-law No. 9789 was passed by the council of the city of Winnipeg amending by-law No. 1853. The main section of the last-mentioned by-law as amended now reads as follows:

1. From and after the 19th day of July, A.D. 1900, all classes of shops within the City of Winnipeg, where or wherein goods are exposed or offered for sale by retail shall be and each of them shall be and remain closed on each and every day of the week, between six o'clock in the afternoon of each day and five of the clock in the forenoon of the next following day, with the following exceptions:—

On Saturdays and during the last three weeks in December, and also the days immediately preceding the following days, namely:—New Year's Day, Good Friday, the Twenty-fourth day of May and Dominion Day; and all classes of shops in the City, as aforesaid, shall be and remain closed from ten of the clock in the afternoon of the days hereinbefore mentioned as excepted, namely, Saturdays, the week days in the last three weeks in December, and the days immediately preceding the following days: New Year's Day, Good Friday, the Twenty-fourth day of May and Dominion Day, until five of the clock in the forenoon of the following day.

(a) Provided that this by-law shall not apply to any shop where the only trade or business carried on is that of a fruiterer, confectioner, pastry cook, tobacconist, news agent, hotel, inn, tavern, victualling or refreshment house, nor shall this by-law be held to apply to any such shop merely because bread, butter or milk is sold or offered for sale therein:

(b) The words "shop" or "shops" where contained in this by-law shall mean and include any building or portion of a building, booth, stall or place.

The following questions were stated for the opinion of this Court:

1. Is the conviction erroneous in law and should the same be quashed?

2. Was the shop of the accused lawfully open at the hour of 9 o'clock on the evening of November 28th, 1918?

3. Is by-law No. 1853 as amended of the City of Winnipeg *ultra vires* and void?

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4. Is the said by-law as amended arbitrary and oppressive, and does it discriminate between merchants of the City of Winnipeg selling the same articles or class of goods?

5. Is said by-law in restraint of trade and commerce?

By sec. 3 of *The Shops Regulation Act*, R.S.M. 1913, ch. 180:

Any municipal council may, by by-law, require that, during the whole or any part or parts of the year, all or any class or classes of shops within the municipality * * * shall be closed, and remain closed on each or any day of the week at and during any time or hours between six of the clock in the afternoon of any day and five of the clock in the forenoon of the next following day.

By sec. 2 of the Act, as amended by 1918, ch. 81, the word "shop," in the 16 next following sections and in any by-law passed under the provisions thereof, means

any barber shop or any building or portion of a building, booth, stall or place where goods are exposed or offered for sale by retail, but not where the only trade or business carried on is that of a tobacconist, fruiterer, confectioner, news-agent, hotel, inn, tavern, victualling house or refreshment house, nor any premises wherein, under license, spirituous or fermented liquors are sold, etc.

The statute says that the expression "shop" when used in secs. 3 to 18 of the Act, or in any by-law passed under the provisions of the Act, does not include a place where the only trade or business carried on is that of a tobacconist, fruiterer, etc. The tobacconist and the others enumerated as exceptions in sec. 2 cannot be affected by an early closing by-law as long as each confines himself to his distinctive trade or business, but if he carries on an additional trade or business at his place he ceases to be an exception and may be made subject to such a by-law. Therefore, if the tobacconist deals also in bread, butter or milk his place becomes a "shop" within the meaning of the Act and may come under a by-law passed in accordance with it. But the municipal council under the powers given by sec. 7 the Act may still exclude him from the operation of the by-law. The council, it would seem, has power under the Act to so exclude him even if he added to his business of tobacconist a much more extensive line of groceries than bread, butter and milk. But if a municipal council in passing a by-law has acted strictly within the powers conferred upon it by the Legislature the question of the

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fairness or reasonableness of the by-law does not arise: *In re Boylan & Toronto,* 15 O.R. 13; *Simmons v. Malling Rural District Council,* 13 T.L.R. 447; *Stark v. Schuster, supra,* at 684, 695 (14 Man. R.).

I would answer the questions submitted as follows: To the first, second and third questions, "No"; to the fourth and fifth questions, "No answer is necessary."

CAMERON, J.A.—The contention is that by-law No. 1853 of the city of Winnipeg as amended by by-law No. 9789 is *ultra vires* of *The Shops Regulation Act,* ch. 180, R.S.M., 1913. As amended it extends the statutory exemption given to tobacconists and others to the same persons when they sell or offer for sale bread, butter or milk. It is contended that this cannot be done by the council and that the test to be applied is whether it results in discrimination. In this case it is alleged that discrimination does and must arise as between tobacconists who sell or offer for sale bread, butter and milk and are not required to close and grocers who must close their shops to their manifest disadvantage. That result is possible and, indeed, inevitable. But any by-law such as this, even if indisputably within the powers given by the Act, is bound to give rise to inequities in its operation. But that consequence cannot affect the validity of the by-law so long as it is authorized by the terms of the statute. By sec. 3 the council may require all or any class or classes of shops to close as therein set forth and by sec. 7, it may make regulations "as to the classification of shops for the purposes of the preceding sections." A tobacconist (when that is his only trade) is by the Act excepted from the powers of the council. But when he commences to deal in bread, butter and milk he loses his privileged position. Is there any reason to be gathered from the Act why the council should not expressly exempt from the by-law tobacconists who sell bread, butter or milk? The council has power to make regulations as to the classifications of shops for the purposes of the Act and those powers are not restricted in any way, but are general. It seems to me, therefore, that the council has the power to make a classification of shops in which the shops of tobacconists selling bread, butter and milk shall be considered as if there were still those of tobacconists carrying on

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CAMERON, J.A.

that trade only and therefore exempt from the prohibitions of the by-law. The council is given full authority to classify shops as it sees fit so long as it observes the conditions of the statute, and it is not apparent that the discretion of the council should be hampered by any other considerations. The council is a representative body, amenable to the electors, acting presumably in the best interests of the community and empowered to pass by-laws in these matters as authorized by the Legislature. This early closing legislation concerns a difficult subject, which can only be dealt with by compromise between conflicting interests. With its merits or the merits of the by-law we have nothing to do. The classification made may be arbitrary and productive of inequalities and discriminations, but it is impossible to avoid such results in by-laws of this kind. That is all a matter for the council and in the exercise of its discretion. The sole question before us is whether this by-law is passed in accordance with the wide powers conferred by the statute under which the council can exclude from the operation of the by-law any class or classes of shops. It could, if it chose, exempt all grocery stores or confine its provisions to them exclusively.

Whether or not a municipal by-law is unreasonable is a question which should be decided on an application to quash rather than on a motion to set aside a conviction, which this application is in substance. See *Reg. v. Gravelle,* 10 O.R. 735. It is now generally conceded that if a statute gives powers to a body of persons to make rules for a specific purpose, the reasonableness of such rules, provided they are strictly confined to the purposes for which they are authorized to be made, is not examinable by the Judges: *Biggar, Municipal Manual,* p. 330, and the question whether a by-law is or is not reasonable appears to be, as a rule, a branch of the question whether it is or is not *ultra vires. Ibid* 331. See *Kruse v. Johnson* [1898] 2 Q.B. 91, 67 L.J.Q.B. 782; per Lord Russell of Killowen, who holds that a liberal rule must be applied to the by-laws of representative bodies entrusted by parliament with legislative powers for the public good; and also the judgment of Lord Hobhouse in *Slattery v. Naylor,* 13 App. Cas. 446, 57 L.J.

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P.C. 73, which has been followed in numerous cases. I refer also to the judgments of the Full Court in *Stark v. Schuster*, 14 Man. R. 672.

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Judgment.

HAGGART, J.A.

HAGGART, J.A. concurs with Perdue, C.J.M.

FULLERTON, J.A. (dissenting)—This matter comes before this Court by way of a case stated by Sir Hugh John Macdonald, police magistrate of the city of Winnipeg.

Perley was convicted under by-law No. 1853 of the city of Winnipeg as amended by by-law No. 9789 for that he did

at the City of Winnipeg on Thursday, the 28th of November, 1918, unlawfully omit to close and keep close his shop in the City of Winnipeg, where goods are offered and exposed for sale between the hours of six o'clock in the afternoon on said date and five o'clock in the morning of the said following day * * *

The evidence shows that the accused carries a full line of groceries on one side of his shop and on the other side confectionery and fruit.

The by-law in question and the amendment thereto could only have passed under the authority of sec. 3 of ch. 180, R.S.M., 1913, entitled *The Shops Regulation Act.*

The question reserved is whether by-law No. 1853 as amended is *ultra vires* and void.

By-law No. 1853 provides that

All classes of shops within the City of Winnipeg, where or wherein goods are exposed or offered for sale by retail (but not where the only trade or business carried on is that of a tobacconist, news agent, hotel, inn, tavern, victualling or refreshment house) shall be and each of them shall be and remain closed on each and every day of the week, between six o'clock in the afternoon of each day and five of the clock in the forenoon of the next following day.

with certain exceptions not here material.

By the amending by-law No. 9789 the words in parenthesis are struck out and the following section added:

(a) Provided that this by-law shall not apply to any shop where the only trade or business carried on is that of a fruiterer, confectioner, pastry cook, tobacconist, news agent, hotel, inn, tavern, victualling or refreshment house, *nor shall this by-law be held to apply to any such shop merely because bread, butter or milk is sold or offered for sale therein.*

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It is contended that the by-law is *ultra vires*, on the ground that it discriminates against grocery shops.

The validity of the by-law of course depends upon the powers conferred on the council by *The Shops Regulation Act*. Sec. 2(*a*) of that Act as amended by ch. 81, Statutes of Manitoba 1918, defines "shop" as follows:

> (*a*) The expression "shop" means any barber shop or any building or portion of a building, booth, stall or place where goods are exposed or offered for sale by retail, but not where the *only* trade or business carried on is that of a tobacconist, fruiterer, confectioner, news-agent, hotel, inn, tavern, victualling house or refreshment house * * *
>
> Sec. 3: Any municipal council may, by by-law, require that, during the whole or any part or parts of the year, all or any class or classes of shops within the municipality * * * shall be closed, and remain closed on each or any day of the week at and during any time or hours between six of the clock in the afternoon of any day and five of the clock in the forenoon of the next following day.

It is quite evident that "class or classes of shops" referred to in the last-quoted section can have no reference to the classes of shops excepted by 2 (*a*). The statute gives the council no power whatever to regulate the closing of shops of the excepted classes so long as they confine themselves to carrying on their respective trades. The words of sec. 2 (*a*) are "where the *only* trade or business carried on is that of a tobacconist, etc."

The moment a member of the excepted class begins to carry on a business outside the named excepted classes his place of business becomes a "shop" within the meaning of the statute.

The effect of the by-law, if valid, is to allow a tobacconist for example to sell bread, butter and milk—a class of business clearly outside that of a tobacconist. Under the statute his place of business thereupon becomes a shop and the result is discrimination in his favour as between himself and other traders selling bread, butter and milk. If the council can authorize the excepted classes to sell bread, butter and milk after the hour fixed by the by-law, it can go further and authorize the sale of all goods handled by other traders with the result that there would be the plainest possible case of discrimination.

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A fifth property of a by-law is that it should be general, obligatory upon all persons equally and indiscriminately. It must not be made for the benefit or for the detriment of any particular person. [*Lumley on By-laws*, 99.]

In *Kruse v. Johnson* [1898] 2 Q.B. 91, 67 L.J.Q.B. 782, Lord Russell of Killowen, C.J., said at p. 99:

Notwithstanding what Cockburn, C.J. said in *Bailey v. Williamson*, L.R. 8 Q.B. 118, 42 L.J.M.C. 49, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.

In my opinion the by-law as amended is *ultra vires* and void for the following reasons: (1) No power is given to the council to pass any by-law in relation to the classes of trades excepted by the statute; (2) The by-law as amended discriminates against other traders carrying the same line of goods.

I would answer all the questions in the stated case in the affirmative.

DENNISTOUN, J.A.—This is a case stated by Sir Hugh John Macdonald, police magistrate of Winnipeg. It turns upon the validity of by-law No. 9789 of the city of Winnipeg, which relates to the early closing of shops, and amends by-law No. 1853, which was upheld in *Stark v. Schuster*, 14 Man. R. 672. The portions of the by-law to be dealt with and the questions propounded by the magistrate are set forth by the Chief Justice in his reasons for judgment.

By sec. 3 of *The Shops Regulation Act*, R.S.M., 1913, ch. 180: [See *ante*, p. 445.]

By sec. 2 of the Act as amended by 1918, ch. 81, "shop" is defined, but there is excepted from such definition a shop

where the only trade or business carried on is that of a tobacconist, fruiterer, confectioner, news-agent, hotel, inn, tavern, victualling house or

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refreshment house, or any premises wherein, under license, spirituous or fermented liquors are sold.

The clause of the by-law which has been attacked as *ultra vires* of the city council is 1 (a) which reads:

Provided this by-law shall not apply to any shop where the only trade or business carried on is that of a fruiterer, confectioner, pastry cook, tobacconist, news-agent, hotel, inn, tavern, victualling or refreshment house, *nor shall this by-law be held to apply to any such shop merely because bread, butter, or milk is sold or offered for sale therein.*

The lines italicized are, it is urged, an enlargement of the scope of the statute and *ultra vires* of the city council to enact, but a careful examination of the statute and by-law do not lead me to such a conclusion.

The statute does not apply to tobacconists, etc., who confine themselves to their designated trade and make it the "only trade" carried on. So long as they devote themselves exclusively to that single purpose they are exempted by the statute from the operation of any by-law which the council may pass under that Act.

But so soon as the tobacconist, etc. adds to his stock in trade, bread, butter or milk, he ceases to be a "tobacconist" etc. and becomes a "shop keeper" and his statutory exemption is gone.

The by-law then presents a new set of exemptions and among them one which says in effect "all shopkeepers who sell tobacconists' (etc.) supplies together with bread, butter or milk shall be exempt from the provisions of this by-law." This seems to be authorized by the statute which permits the creation of "classes of shops" without any limitation and if the council see fit to classify shops which deal in specified groups of commodities, there is nothing in the words of the statute to prevent them from so doing. By-laws should of course be neither unreasonable, discriminating nor unjust and many by-laws have been quashed because they are so. But in municipal legislation of this character it is quite impossible to pass a by-law which does not offend against some class of shopkeeper, or employees. Discrimination and even injustice are certain to be charged by one or other section of the shopkeeping community, but unless they are sufficient to shock the

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conscience of the Court it is better to leave the adjustment of such wrongs to the representatives of the people who may be expected to understand their requirements better than most Judges. Lord Russell said in *Kruse v. Johnson* [1898] 2 Q.B. 91, at p. 98, 67 L.J.Q.B. 782, and his reasoning was quoted with approval by this Court in *In re By-Law No. 92, Town of Winnipeg Beach* [1919] 3 W.W.R. 696: "Municipal by-laws are not like the laws of the Medes and Persians—they are not unchangeable." If experience shows that this by-law works hardly or inconveniently, the city council will repeal it if they consider it in the interest of the general body of the citizens to do so.

For these reasons I am of opinion that the by-law is not *ultra vires* of the city council and that this Court should not interfere upon the ground that it is discriminatory.

I would answer the learned magistrate's questions: (1) No; (2) No; (3) No; (4) Not answered; (5) Not answered.

Judgment accordingly.

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COURT OF APPEAL

McDILL *v.* HILSON

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Sale of Goods—Passing of Property—Vendor to Put in Deliverable State —Payment of Purchase-Price—Destruction of Goods—Recovery Back of Price by Purchaser.

An arrangement was made to buy certain furniture. It was to be polished by the vendor before delivery. A deposit was paid and subsequently the purchase-price was paid in full. Later and before any polishing was done and before delivery a fire on the vendor's premises destroyed the furniture.

Held under R. 2 of sec. 20 of *The Sale of Goods Act* the property had not passed, notwithstanding payment of the purchase-price, the amount of which the purchaser was entitled to recover back.

ARGUED: 15th June, 1920.
DECIDED: 25th June, 1920.

Statement. APPEAL by plaintiff from judgment in an action to recover back the purchase-price of certain furniture which he had paid. Appeal allowed with costs.

E. D. Honeyman, for plaintiff, appellant.
C. L. Monteith, for defendant, respondent.

PERDUE, C.J.M., CAMERON and HAGGART, JJ.A. concurred.

FULLERTON, J.A.—The plaintiff arranged with the defendant to purchase from him certain furniture. The furniture was chipped and scratched and it was agreed that the defendant should polish it and deliver it at a subsequent date to an address which the plaintiff would give him. Before the furniture was polished and while still in the defendant's possession a fire occurred and it was destroyed. Plaintiff paid $5 deposit on the price and subsequently paid the balance $370.

The question is whether the plaintiff or the defendant must bear the loss. This depends on whether or not the property in the furniture had passed to the plaintiff at the time of the fire.

Sec. 19 of *The Sale of Goods Act,* R.S.M., 1913, ch. 174, provides as follows:

Where there is contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard

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shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Section 20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

(*b*) Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

"Deliverable state" is defined by sec. 2, subsec. 4 of the Act as follows:

Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

There is nothing in "the terms of the contract, the conduct of the parties, or the circumstances of the case" to indicate that it was the intention of the parties that the property in the furniture should pass before it was polished. The buyer clearly could not be compelled to take it until it had been polished in accordance with the agreement. The goods were consequently not in a deliverable state when the contract was made and the case comes squarely within Rule 2 above quoted.

It was urged, however, that the payment by the plaintiff of the consideration had the effect of converting the transaction into a sale and that the agreement to polish the furniture was a mere collateral agreement. I am unable to understand this contention. In *Logan v. Le Mesurier,* 6 Moo. P.C. 116, 11 Jur. 1091, the sale was of a quantity of timber measuring 50,000 feet more or less to be delivered by the defendants. If the quantity turned out more than 50,000 feet, the purchasers were to pay for the surplus on delivery and if it fell short, the difference was to be refunded by the sellers. The raft of timber was broken up by a storm and lost before it was measured and delivered.

It was held that the former part of the contract whereby an ascertained chattel was sold for an ascertainable sum, was controlled by the latter part providing for a measurement and adjustment of the price on delivery and accordingly that the property was not transferred until measured. *The plaintiff had paid for the timber* and the action was brought to recover

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FULLERTON, J.A.

back the price. It was held that the plaintiff was entitled to succeed.

In *Acraman v. Morrice*, 8 C.B. 449, 19 L.J.C.P. 57, the defendant had contracted for the purchase of the trunks of certain oak trees from one Swift. The course of trade between the parties was, that after the trees were felled, the purchaser measured and marked the portions he wanted. Swift was then to cut off the rejected parts and deliver the trunks at his own expense. The timber in controversy had been bought, measured, *and paid for*, but the rejected portions had not yet been severed by Swift when he became bankrupt, and the felled trees then lay on his premises. The defendant afterwards had the rejected portions severed by his own men, and carried away the trunks for which he had paid. Action in trover by the assignee of the bankrupt. Held that the property had not passed to the buyer.

In neither of these cases was the point suggested that the payment of the price had any bearing on the question of the passing of the property.

In my view the payment of the purchase-price does not, of itself, afford any indication of the intention of the parties as to the passing of the property. I think the plaintiff is entitled to recover from the defendant the sum paid him as the price of the furniture.

I would allow the appeal with costs and direct that judgment be entered in favour of the plaintiff for the amount claimed with costs.

DENNISTOUN, J.A.—On June 21, 1919, the plaintiff and his wife were examining some parlour furniture at the defendant's auction rooms with a view to purchasing it. The furniture was second-hand and was scratched and chipped.

The defendant's salesman in order to induce the plaintiff to purchase said that the furniture would be French-polished, but that the polisher was on strike and it could not be done until his return.

The plaintiff said he was in no hurry, that he would take "the eleven piece parlor suite and the bed, to be put right and

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delivered not later than a month." The price was fixed at $200.

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Plaintiff then paid a deposit of $5, on June 24, his wife paid a further sum of $170 and on June 30 the balance of $25 was paid in full.

A memorandum was given to the plaintiff on June 21 on one of the defendant's bill forms. It sets forth the furniture and the price and contains the following: "Lot to be polished. No hurry. Hold one month. Paid in full." Then follow the initials of the salesman, with the date of the last payment, "30-6-19."

On June 28, the plaintiff saw a piano at the defendant's rooms which was badly scratched and chipped, and it was agreed that it would be French polished also and delivered for $175, which was paid.

On July 5, the plaintiff told the defendant's salesman that he had moved into a house of his own and could take delivery of the lot but "was waiting for it to be polished up." He was informed that the work had not been done as the polisher was still on strike. The evidence is that it would take about two days to French-polish the piano and that the polisher charged $1 per hour while at work. The time required to polish the 11 pieces of parlour furniture is not stated.

The plaintiff paid the defendant in all the sum of $375.

Before any work was done to the furniture or piano and before delivery, a fire in the defendant's premises destroyed the furniture and the piano, and the plaintiff asks in this action for the return of his money. The learned trial Judge granted a nonsuit on the ground that the title to the property had passed to the plaintiff, who should bear the loss. Plaintiff appeals.

In my humble opinion the appeal should be allowed.

By sec. 20 of *The Sale of Goods Act*, R.S.M., 1913, ch. 174, unless a contrary intention appears, where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a de-

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liverable state, the property does not pass until such thing be done and the buyer has notice thereof.

By sec. 2 (4) goods are in a deliverable state within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

It was a condition upon which the agreement to purchase was made that the goods should be French-polished and delivered. They never were in a deliverable state within the meaning of the definition quoted, and the title did not pass from the defendant to the plaintiff, nor is there any evidence of a contrary intention. *Young v. Mathews*, L.R. 2 C.P. 127, 36 L.J.C.P. 61; *Laidler v. Burlinson*, 2 M. & W. 602, 6 L.J. Ex. 160.

Payment of the purchase-price was not a waiver of the condition which the defendant failed to perform. The Act is silent on this point unless the Court can infer that when the money was paid over it was the intention of the parties, evidenced thereby, that the title should pass. I am unable to draw that inference from the evidence. The plaintiff and his wife were unwilling to buy the furniture in the condition in which they saw it. The defendant agreed to renovate it by an expert at some expense and to deliver it at the plaintiff's address. The plaintiff relying on the defendant's undertaking to have the work done, paid over his money; but the contract remained executory on the defendant's part and on his breach of the stipulated condition was subject to cancellation. Performance having become impossible by reason of the destruction of the specific articles sold, the plaintiff was justified in declaring it at an end and in demanding his money back.

A case in point is *Rugg v. Minett*, 11 East. 210 (10 R.R. 475). Turpentine in casks was sold by auction at a price per cwt. A deposit was to be paid at the time of the sale and the balance within 30 days on delivery. It was the duty of the seller to fill up the casks to a certain marked quantity. This was to be done from the two last casks which were sold at uncertain quantities. Some of the casks were so filled, but before the rest were filled a fire consumed the whole lot. Lord Ellenborough, at p. 217, says:

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When the casks were filled up, every thing was done which remained to be done by the sellers, * * * * * which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter. But with respect to the other ten casks, as the filling them up according to the contract remained to be done by the sellers, the property did not pass to the buyers, and therefore they are not bound to pay for them.

The fact that a part of the purchase-price had been paid by the defendant did not preclude the defendant from the defence raised.

In *Logan v. LeMesurier*, 6 Moo. P.C. 116, 11 Jur. 1091, the judgment of the Judicial Committee of the Privy Council was delivered by Lord Brougham.

The vendors sold timber to the purchasers, consisting of 1,391 pieces measuring 50,000 feet, more or less, to be deliverable at a certain boom at Quebec on or before June 15 next, and to be paid for by the purchasers' promissory notes at the the rate of 9½d per foot measured off: if the quantity turned out more than above stated the surplus was to be paid for, and if it fell short the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate was paid according to the terms of the contract. The timber was not delivered on the day prescribed, and when it arrived at Quebec, and before it was measured and delivered the raft was broken up by a storm whereby the greater part of the timber was dispersed and lost.

The purchasers sued to recover the amount paid on their promissory notes and for breach of contract. The Privy Council held that the action was maintainable; that by the terms of the contract, until the measurement and delivery of the timber were made, the sale was not complete, nor did the title pass, and the purchaser was entitled to recover the amount which he had paid to the vendor.

In *Acraman v. Morrice*, 8 C.B. 449, 19 L.J.C.P. 57, the purchaser agreed to purchase the trunks of certain oak trees then felled and lying at Hadnock. The purchaser was to select and mark those portions which he intended to purchase and the vendor was to sever the tops and sidings, and float the trunks

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down the river to Chepstow, and there deliver them. After a portion of the timber had been delivered, and the whole paid for, the vendor became bankrupt; whereupon the purchaser sent his men to Hadnock and severed and carried away the marked portions of certain trees: Held, that no property in the trees, or any portion of the trees which had not been delivered passed by the contract. The fact that the purchase-price had been paid made no difference.

Relying on these and other similar authorities, I think with respect that the appeal should be allowed and judgment entered for the plaintiff for $375 with costs here and below.

Appeal allowed with costs.

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COURT OF APPEAL 1920

REX *v.* SEGAL

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

Intoxicating Liquors—Manitoba Temperance Act—Whiskey Proved under "Control" of Accused—S. 91.

Accused was convicted of keeping liquor for sale. On a search of his premises nine cases were found in his kitchen which had been unloaded from a dray standing in a lane at the rear and 27 cases were still on the dray. The nine cases were replaced on the dray and all were taken away and stored. No examination was made at the time. Later one of the cases was opened and found to contain whiskey, but it did not appear whether this was in the kitchen or on the dray. All the cases were marked with the name of a maker of whiskey.

Held (*per curiam*, Fullerton, J.A. *dissentiente*) whether or not the case examined was in the kitchen the magistrate was justified in holding it was under the control of accused and there was *prima-facie* evidence upon which he could find accused "had in his possession or charge or control" intoxicating liquor, and under sec. 91 of *The Manitoba Temperance Act* the onus was upon accused of proving he did not commit the offence charged.

ARGUED: 14th June, 1920.
DECIDED: 25th June, 1920.

Statement.

APPEAL by way of *certiorari* from conviction for keeping liquor for sale contrary to the provisions of *The Manitoba Temperance Act*. Conviction affirmed, Fullerton, J.A. dissenting.

Ward Hollands, for accused, appellant.
John Allen, for Crown, respondent.

PERDUE, C.J.M. and CAMERON, J.A. concurred with Dennistoun, J.A.

FULLERTON, J.A. (dissenting)—The conviction in this case is for keeping liquor for sale. Officers of the temperance department armed with a search warrant visited Segal's house and found nine cases in the kitchen which had just been unloaded from a dray standing in the lane at the rear of the house. There were 27 cases still on the dray. The nine cases were replaced on the dray and all were taken away and stored in a warehouse. The cases were all marked "G. W. Special," but no examination was made at the time of any of them. Shortly before the trial one of the cases was opened and found to contain rye whiskey.

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FULLERTON, J.A.

Sec. 91 of *The Manitoba Temperance Act*, 1916, ch. 112, provides as follows:

> If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the * * * keeping for sale * * * of liquor, *prima facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged.

The sole question then is whether the Crown has proved that the liquor in question here was in the possession or charge or control of Segal.

There is, of course, evidence that one out of the 36 cases contained liquor, but whether that particular case was in the kitchen or on the dray does not appear from the evidence. The contention is made that the cases on the dray were, if not in the possession, at least under the charge and control of Segal. The evidence does not show whether the lane in question was a public or a private lane. If the former, I am at a loss to understand how, under the facts proved in this case, the liquor in question can be said to have been in the charge or control of Segal.

I think the Crown has failed to give the *prima facie* evidence required by sec. 91, and it follows that the conviction is bad and should be quashed.

DENNISTOUN, J.A.—There was in my opinion *prima-facie* evidence upon which the learned magistrate could find that the accused had in his possession or charge or control intoxicating liquor and under the provisions of sec. 91 of *The Manitoba Temperance Act*, 6 Geo. V., ch. 112, the onus was cast upon the accused of proving that he did not commit the offence with which he was charged. There was undoubtedly a case of whiskey upon the waggon which stood in the partially covered-in lane between Segal's house and bakeshop. There were in all 36 cases similarly marked "Gooderham & Worts Whiskey" on the waggon but only one of them was examined. It was all one consignment. Nine of the cases had been transferred to Segal's kitchen when the government officers intervened and took possession of the lot, 27 cases on the waggon and nine in the kitchen, and carried them off to a storage ware-

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house. Counsel for the accused argues that there was no evidence that any of the nine cases which had been placed in the kitchen did as a fact contain intoxicating liquor. That may be true. The single case which was examined and found to contain whiskey may have been in the kitchen or it may not have left the waggon; but I think the magistrate was justified in holding that in any event it was under the control of the accused. The explanation which the accused gave was not believed and the magistrate had good grounds for refusing to believe his improbable story that he knew nothing about the whiskey or the delivery which was being made when the officers came on the scene.

I would affirm the conviction.

Conviction affirmed, Fullerton, J.A. dissenting.

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COURT OF APPEAL

MOGGEY *v.* BLIGHT

Before PERDUE, C.J.M., CAMERON, HAGGART, FULLERTON and DENNISTOUN, JJ.A.

Trial—Application for New Trial—Witness Prepared to Give Different Evidence Than at Trial—New Evidence Merely Corroborative or Cumulative.

On an application for a new trial under sec. 328 of *The County Courts Act*, R.S.M., 1913, ch. 44, although the Judge has a wide measure of discretion, it is a judicial discretion which must be exercised in accordance with established principles.

A new trial should not be granted in order to receive the evidence of a witness who gave testimony at the trial, but declares that he has since discovered that that testimony was erroneous and that he is now prepared to state something contrary to it.

A new trial should not be granted in order to receive evidence which would be merely corroborative or cumulative in respect of other evidence given on one side and contradicted by evidence on the other side.

ARGUED: 16th June, 1920.
DECIDED: 25th June, 1920.

Statement. APPEAL by defendant from an order of Barrett, C.C.J. granting a new trial in an action of replevin. Appeal allowed.

J. P. Foley, K.C., for defendant, appellant.
P. C. Locke, for plaintiff, respondent.

PERDUE, C.J.M.—This is an appeal from an order made by His Honour Judge Barrett granting a new trial. The action is one of replevin brought in the County Court of Portage la Prairie to recover possession of a cow and her calf, valued at $130, which the plaintiff claims as his property. The defendant states that he purchased the cow from one Brown and disputes the plaintiff's claim. The trial lasted five days, over 20 witnesses being examined. As the learned Judge states in his judgment on the motion for a new trial, the issue upon the trial narrowed itself down to the question of whether there was or was not a brand upon the cow that had been replevied. At the close of the case the Judge desired to call further evidence upon that point and two witnesses were called by him. These witnesses, Dempsey and Fowler, after making an examination of the cow in question gave evidence to the effect that there was no brand upon her. The Judge

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states that the evidence or these two witnesses exercised some weight in causing him to decide, as he thereupon did, in favour of the defendant.

A week after judgment had been given in the case the witness Fowler made a further examination of the cow for the purpose of again searching for the mark of a brand upon her. On this second examination, which lasted about two hours, he claims to have found marks of a brand on the upper left hip of the animal in the very spot he had examined a week before when he had found none. The plaintiff applied to the Judge for a new trial on the ground that this new evidence had been discovered. The Judge granted the application and ordered a new trial. From that order this appeal is brought.

Under sec. 328 of *The County Courts Act*, R.S.M., 1913, ch. 44, a new trial or a re-hearing may be granted by the Judge "upon sufficient cause being shown for that purpose." No doubt, the Judge has a wide measure of discretion in granting or refusing applications of this nature, but it is a judicial discretion which must be exercised in accordance with the established principles governing the granting or refusing of new trials; *Murtagh v. Barry*, 24 Q.B.D. 632, 59 L.J.Q.B. 388; *Brown v. Dean*, [1909] 2 K.B. 573, 78 L.J. K.B. 840; [1910] A.C. 373, 79 L.J.K.B. 690; *Sklar v. Borys*, 10 Sask. L.R. 359, [1917] 3 W.W.R. 188. This is not a case of the discovery of new evidence which could not with reasonable diligence have been adduced at the trial. It is a case where a witness who had given testimony at the trial declares that he has since discovered that that testimony was erroneous and that he is now prepared to state something quite contrary to it. To grant a new trial in order to receive such evidence would be, in my opinion, without precedent and contrary to the interests of justice. In *Hanson v. Ross*, 42 N.B.R. 650, at p. 656, McLeod, C.J., said:

> It would be manifestly improper to grant a new trial because a witness who was examined on behalf of the defendant claims that he could on a new trial give some different evidence.

There is the further objection that the proposed new evidence would be merely corroborative or cumulative in respect of other evidence given by plaintiff's witnesses and contradict-

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ed by witnesses called by the defendant. See *Trumble v. Hortin*, 22 O.A.R. 51; *Anderson v. Titmas*, 36 L.T. 711; *Howarth v. McGugan*, 23 O.R. 396; *Riverside Lumber Co. v. Calgary Water Power Co.*, 10 Alta L.R. 128, 10 W.W.R. 980, 34 W.L.R. 859, 28 D.L.R. 565.

With great respect I think the appeal should be allowed and the order granting a new trial set aside. The plaintiff must pay the costs of this appeal and of the application to the County Court Judge for a new trial.

CAMERON and HAGGART, JJ.A. concur.

FULLERTON, J.A.—Sec. 326 of *The County Courts Act*, (ch. 44, R.S.M., 1913) provides that

> A new trial or re-hearing may be granted, or a judgment reversed or varied, in any action, suit, matter or proceeding, ***upon sufficient cause being shown for that purpose.***

New trials are not granted as a matter of course where the applicant can show that new evidence of a material character has been discovered. He must also show: (1) That the evidence could not, with reasonable diligence, have been discovered, and have been given before; (2) That the evidence is not merely verbal corroboration of evidence given at the trial; (3) That the evidence is such that there is a reasonable probability that if the new trial is proceeded with a different verdict to that in the former trial will be given. *Trumble v. Hortin*, 22 O.A.R. 51; *Anderson v. Titmas*, 36 L.T. 711.

The point involved in this case is the identity of a cow which the plaintiff attempted to prove was branded with his brand. Ten witnesses were called by the plaintiff and nine by the defendant, all of whom gave evidence as to the brand. The trial Judge then appointed two men—Fowler and Dempsey—to examine the cow, both of whom swore that the cow was not branded and the judgment was then given for the defendant.

Plaintiff applied under sec. 326 of *The County Courts Act* for a new trial, on the ground of newly-discovered evidence and also on the ground that Fowler had made another examination and discovered that the cow was branded with the plaintiff's brand.

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The plaintiff deposes that since the conclusion of the trial he has been informed by a large number of reliable and creditable men that they have made an examination of the cow in question and have discovered and been able to discern plainly the marks and brands on the left hip of the cow as described by the plaintiff in his evidence at the trial.

Such evidence cannot, in any sense, be said to be newly-discovered evidence, and in any event would be merely corroborative of the evidence given by the 10 witnesses called on behalf of the plaintiff.

The sole point then which is left to the plaintiff is the alleged mistake of the witness Fowler. Fowler, before the trial, examined the cow for 15 minutes and could find no brand. After the trial he says he made an examination lasting two hours and discovered the brand. It appears to me that under these circumstances his evidence on the new trial would be of little weight.

The costs already incurred are out of all proportion to the amount involved, and I think it is in the interest of both plaintiff and defendant that the litigation should be ended. I would allow the appeal.

DENNISTOUN, J.A. concurs.

Appeal allowed with costs.

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CHAMBERS

IN RE THE PRUDENTIAL LIFE INSURANCE COMPANY.

Before GALT, J.

Companies—Winding Up—Liquidator—Interim Remuneration—Application for—Material in Support—Right to Examine Liquidator—Unjustified Disbursement Charges—Unreasonable Resistance to Discovery—Costs of Motion against Liquidator Personally.

A mere statement exhibited by affidavit of a liquidator's receipts and disbursements is inadequate to support an application by him for interim remuneration.

On an application by a liquidator for an interim remuneration he may be examined on his affidavit and exhibits used thereon.

The fact that a liquidator being examined as aforesaid is only vouching his accounts and claiming remuneration to a certain date, does not excuse him from being examined as to moneys received subsequent to such date.

A company acting as liquidator cannot charge fees for legal documents drawn by its clerk (this being in violation of sec. 7 of *The Conveyancers Act*) although the clerk was a solicitor.

A company acting as liquidator cannot charge as a disbursement commission on collections made by its own branch office in another province.

The Court held that a commission fee paid by a liquidator to a solicitor in addition to his full ordinary costs in the collection of accounts was unjustifiable and should not be allowed as a disbursement to the liquidator.

A liquidator should not pay a large solicitor's bill without taxation or the sanction of the Court.

Although if an expert financial man were selected as the liquidator of a company it might be reasonable and proper to allow him to rent one or more additional rooms to those comprising his office, and to allow the rent he paid as a disbursement, and also any additional clerks he might have to employ, this does not apply to companies whose business it is to act as liquidators; and it is very doubtful if such company acting as liquidator has any right to pay to itself and charge as a disbursement rent for room in a building owned by it and occupied for the purposes of the liquidation, unless such payment is made under the sanction of the Court; the same doubt might apply to such charges made for light, stationery, postage, janitor and telephone service; also as to charges for salaries paid to clerks.

A liquidator's motion for interim remuneration was dismissed with costs because supported by inadequate material and because it had appropriated certain commissions to which the Court held it had no right. Because of such appropriations and its manager's attitude in resisting what the Court held was reasonable and necessary discovery the costs were ordered to be paid by the liquidator personally.

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ARGUED: 29th April, 1920.
DECIDED: 22nd May, 1920.

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Statement.

APPLICATION by a liquidator for interim remuneration. Application dismissed with costs. Also motion on behalf of shareholders based on refusal of the manager of the liquidator to answer certain questions on examination on his affidavit, allowed with costs.

E. K. Williams, for the liquidator.
F. J. Sutton, for the shareholders.

GALT, J.—On March 29 certain applications in this matter came before me and amongst them was an application by the Northern Trusts Company, liquidator of the Prudential Life Insurance Company, for an interim remuneration of $5,000. The notice of motion in reference to this simply asks that there be allowed to the liquidator on account of its remuneration as liquidator and as provisional liquidator the sum of $5,000 by way of further interim allowance in addition to $10,500 already allowed, and that the liquidator may retain such amount out of the assets of the company.

In support of this motion an affidavit by John Herbert Riley, manager of the Northern Trusts Company, was read. All that Mr. Riley shows in his affidavit in reference to this motion is in paragraph 2:

> That now shown to me and marked Exhibit "A" to this my affidavit is a statement of the receipts and disbursements of the Liquidator from the 4th August, 1915, to the 31st of December, 1919.

Mr. Sutton appeared on behalf of the shareholders, and opposed the motion. He also moved to commit Mr. Riley for contempt in refusing to answer questions when examined upon said affidavit and exhibit.

Mr. Williams, on behalf of the liquidator, strenuously opposed this latter motion on the ground that a liquidator is an officer of the Court and is not liable to examination.

Shortly after the English *Companies Act* was passed it was held by the Court of Appeal in *In re Barned's Banking Co.,* (1866) L.R. 2 Ch. 350, 36 L.J. Ch. 262, that:

> In a proceeding by an alleged contributory under the winding up of a

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company to obtain relief from liability, the official liquidator is in the same position as if a bill had been filed against the company, and he had been made a Defendant for the purpose of discovery. He is therefore bound by the same rules as to answering questions, and producing documents and is entitled to the same privilege, as such a Defendant would be.

This has been the law of the Court ever since, and it applies *a fortiori* to an application made by the liquidator himself. I accordingly overruled the objection and Mr. Riley has since been examined.

The application for remuneration thereupon came again before me on April 29.

The question of remuneration of trustees and liquidators has been dealt with by the Courts of the Dominion in many cases, but the provisions of the Dominion *Winding-up Act*, R.S.C., 1906, ch. 144, do not fix any definite basis of remuneration. The following sections of the Act apply:

40. The liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the court directs, upon such notice to the creditors, contributories, shareholders or members, as the court orders.

2. If there is more than one liquidator, the remuneration shall be distributed amongst them in such proportions as the courts direct.

92. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company, in priority to all other claims.

One of the most recent cases in which the question has been dealt with in Manitoba is *In re Sanford Estate*, 18 Man. R. 413, 10 W.L.R. 82. There Mr. Justice Cameron adopted the views expressed by Teetzel, J. in *In re Toronto General Trusts Corpn.*, 6 O.W.R. 350, at p. 354, and laid it down that in fixing the amount of compensation there should be taken into consideration: (1) The magnitude of the trust; (2) The care and responsibility springing therefrom; (3) The time occupied in performing its duties; (4) The skill and ability displayed; (5) The success which has attended its administration.

Five per cent, consisting of two and one-half per cent on collections and the same for distributions, seems to be recognized both in Ontario and Manitoba as a reasonable remuneration for a complete winding-up, but there is no hard and fast rule: *In re Farmers' Loan Co.*, 3 O.W.R. 837; *In re Central*

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Bank, 22 O.R. 247; *In re Batt, Wright v. White*, 9 P.R. 447; *In re Prittie Trusts*, 13 P.R. 19; *In re Sanford Estate, supra.*

All of these cases apply to the total remuneration allowable to liquidators or trustees, but they also throw light upon the question of interim remuneration.

In *Parker and Clark on Company Law* it is said at p. 431:

> The amount allowed should be equally spread over the whole period of the liquidation so as to secure vigilance and expedition at all stages of the liquidation as well as proper distribution among the liquidators if there are more than one.

Very little assistance can be obtained from the English cases as the method of remunerating liquidators there differs radically from the method applied here.

I have already pointed out that the material before the Court on this application is very slight. Mr. Riley's affidavit fails to show any reason for the application other that what may be inferred from the statement of receipts and disbursements which he makes an exhibit to his affidavit, and then when he is requested to explain the items he at first declined to do so. We now have his examination in regard to the items objected to by Mr. Sutton, so that it is possible to ascertain in detail what the statement of receipts and disbursements shows in general.

1. The third item in the disbursement column of $679.67 is objected to upon the ground that it is now found to contain payments to the liquidator which it was not entitled to receive. I quote the following from Mr. Riley's examination at p. 5:

> Q. There is an item, February 27th, 1917, of $148, that was paid to whom? A. That would be paid to the Northern Trusts Coy.
>
> Q. The liquidators? A. Yes.
>
> Q. For doing what? A. In accordance with this—there is the deal; that is the amount that was made up. * * *
>
> Q. You have charged $148 for drawing discharges, transfers, assignments, and affidavits? A. Yes, they were drawn by one of the officers of the company, who is a solicitor.
>
> Q. But they have been charged to the Prudential? A. Yes.

The services of the officer or clerk, in drawing legal documents, were performed by the clerk as such, and not as a soli-

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citor. The company had no right to the fees, as they were charged in violation of *The Conveyancers Act*, R.S.M., 1913, ch. 40, sec. 7.

The examination then proceeds:

Q. I produce you another voucher, No. 554, which goes to form up the item of $679.67? A. Yes.

Q. That is what? A. This is commission paid to our Calgary office for collecting some money, as shown by this statement.

Q. How much commission did you charge the Prudential? A. 5%.

Q. What was the amount? A. The amount of the commission is $46.15, $922.75 the amount collected.

Q. So the liquidator was charging the Prudential 5% on all collections which he was making? A. No, only where they employed a third party, and in this instance we treated our branch office as a third party.

Q. You treated your branch office as a third party? A. Yes, just the same as if we employed some outside party in Calgary or Regina to make a collection for us.

Q. But it is really your own company? A. It is a separate and distinct office.

Q. It is not a separate or distinct corporation? A. Oh, no.

Q. It is the same corporation? A. Oh, yes.

It appears from the examination that the Northern Trusts Company had branch offices in Calgary and Regina. It also appears that a large number of contributories lived in or about Calgary and Regina. In the ordinary course of business the collections would naturally be sent to those cities, but I cannot think that this convenience in any way justified the company in treating its own branches as a third party. Suppose, for instance, that a financial man in Winnipeg was doing business under the name of John Brown and Company, and that having been appointed liquidator of a company he took upon himself to spend a few weeks in Calgary and make collections there from contributories or otherwise, and remit the proceeds to his Winnipeg office, could it be contended that he would have a right to charge five per cent commission against the assets of the company for his labours at Calgary, and then treat this payment to himself as a disbursement in the liquidation? I think not. It is easy to see that a practice of this kind might enable a liquidator to augment his remuneration far beyond the amount justly allowable.

Mr. Sutton states that the details of this item of $679.67

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show that $321.25 was wrongly paid by the liquidator into its own account.

2. The next item objected to is expressed to be collection expenses, $4,793.44. It appears that the component parts of this item show the sum of $1,996.15 credited by the liquidator to itself in respect of commissions of five per cent earned at Regina, as above explained; also $902.62 for commissions earned at Calgary. It appeared that the liquidator employed a solicitor in Calgary to act in some cases and the solicitor was paid not only his full ordinary costs but a commission fee amounting to $231.32. I think this commission fee was wholly unjustifiable.

3. The next item objected to is portion of the item under general expenses—legal, $3,181.73. The matter is dealt with on pp. 12, 32 and 33 of Mr. Riley's examination. It appears that a bill of costs against the Prudential Company, incurred by Messrs. Pitblado, Hoskin & Company, was being taxed; and that Mr. Hudson was employed as counsel for the liquidator. Mr. Hudson rendered a bill for his services, which is not before me and has never been taxed, but the liquidator has paid the sum of $1,200 in settlement of the bill. Mr. Sutton justly objects that the payment of such an amount without taxation, and without the sanction of the Court, was wholly improper.

4. The next item objected to is a portion of general expense charged by the liquidator at $3,846.70. This contains a charge for rent against the company amounting to $1,950. It appears in the examination of Mr. Riley that the Prudential offices were in the Keewayden Building; but shortly after the liquidation the business was transferred to the Victory Building, owned by the Northern Trusts Company and the Canadian Fire Insurance Company. I quote the following answers from Mr. Riley's examination, beginning on p. 41:

Q. What rental is being paid? A. At the time they were over in the Keewayden Building there was a lease which called for something like $160.00 a month.

Q. How much of that $2,130.00 has been received by the owners of the Victory Building? A. $1,950.00.

Q. For rent from when? A. From the 1st of July, 1916, to the end of the year.

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Q. What is the rental of the Victory Building? A. I think a basis of $50.00 a month. It was reduced to $25.00 per month from the 1st of July, 1919, but it was $50.00 a month up to that date.

Q. And since that date I suppose the office has been devoted to the Company's own purposes, as well as for the Prudential purposes? A. No, the Prudential still occupies the office.

Q. Why was the reduction made? A. There was another liquidation which was entered into, which took over one half of the office.

Q. Of which you are the liquidator? A. Yes.

Q. And do they pay the other $25.00? A. I wont tell you what they pay.

Q. Although they took over half the office? A. Yes.

It would appear that by the time the Prudential business was transferred from the Keewayden Building to the Victory Building all or nearly all of the staff at the Prudential office were dismissed and the practical winding-up of the company was delegated to a Mr. McDougall and a lady stenographer. Mr. McDougall's position is dealt with on pp. 37 *et seq.* of Mr. Riley's examination as follows:

Q. Would you give me particulars relating to the item of $9,361.25 salaries? A. Mr. McDougall was in the employ of the company since September 1st, 1915, to June 30th, 1919, at $150.00 a month.

Q. That is he was working exclusively in the liquidation? A. Yes, he was working exclusively in the liquidation. Since that time, up to the end of the year he has been getting $125.00.

Q. And what time has he been devoting to the liquidation? A. The time necessary to carry out the work.

Q. And the balance of his time is employed how? A. He is being paid $125.00 a month for the work he does for the Prudential Life, and he is carning it.

Q. And is he employed by the Northern Trust Company? A. I don't think I will answer that.

Q. Do you refuse to answer that?

Mr. Williams: Yes.

Q. What proportion of his time is he devoting to the liquidation? A. As much time as is necessary to carry out the liquidation.

Q. How much is that? A. It may be all his time some days and a portion of it the others.

Q. And is the balance of his time devoted to the Northern Trust Company? A. I am not prepared to say.

Mr. Williams: That is the same question.

Q. You are not prepared or do you refuse, which?

Mr. Williams: We refuse to say.

Q. Well will you give me particulars of this item of $9,321.65? A. You have the greater part of it now.

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Mr. Williams: That is simply a matter of computation. He has given you the periods and the amounts. A. Now there is Miss Miller, stenographer. She was one of the old employees of the Prudential. She was with us until the 15th of July, 1918, and she got $65.00 a month for a portion of the time and $75.00 for a portion of the time. I can give you the exact total of hers too. Then Miss McKinnon is a stenographer getting $7.50 per week for the work she does for the Prudential.

Q. Is she also working for the Northern Trust Company?

Mr. Williams: There will be the same answer to that.

Q. You refuse to answer that? A. Yes. * * * *

Q. And subsequent to that time this other lady, Miss McKinnon was employed? A. No, Miss McKinnon has only been in the employ since the 1st of last July, the balance of the time McDougall slaved along himself.

Q. How much does that make? A. McDougall received $7,500.00 salary.

Q. And the balance of the amount was paid to the two stenographers? A. Yes, nobody else.

Later on in the examination certain questions were put to Mr. Riley but were objected to upon the ground that the liquidator was only vouching the accounts down to December 31, 1919. I extract the following from p. 49:

Mr. Williams: On this examination we refuse to answer that question, We are only vouching our accounts down to 31st December, 1919.

Mr. Sutton: I do not understand you vouching your accounts at all. I submit I would be entitled to examine him down to the present day if it would have any bearing on your right to remuneration.

Mr. Williams: Down to December 31st, 1919, we are claiming remuneration.

Mr. Sutton: At any rate you refuse to answer that?

Mr. Williams: Yes.

Q. Well we are at these amounts received by the liquidator, you have only given me the amount which would be received up to the 31st of December, 1919? A. Oh, yes, only the amounts as shown on this statement.

Q. And would you refuse to answer whether you have received any moneys from December 31st, 1919, down to the present time?

Mr. Williams: Certainly.

Q. You understand what I mean, whether the Liquidator has been paid any moneys? A. Yes, I know.

Q. You refuse to answer? A. Yes.

In taking this stand, regarding receipts or payments by the liquidator to itself, subsequently to December 31, 1919, Mr. Rilev was not justified either by law or by expediency.

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Upon an application for further remuneration the Court is entitled to know just how much the liquidator has received up to the time of the application. Any refusal to divulge its receipts since December 31 only leads to the inference that there is something to conceal. The liquidator should have nothing to conceal either from the Court or from persons interested in the liquidation. In *In re Contract Corporation (Gooch's Case)* (1872) L.R. 7 Ch. 207, at p. 211, 41 L.J. Ch. 338, Sir W. M. James, L. J., says:

> In truth, it is of the utmost importance that the liquidator should, as the officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. He should have no leaning for or against any individual whatever. It is his duty to the whole body of shareholders, and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court. And it is for the Judge to see that he does his duty in this respect.
>
> If a person interested in any such case desires to see any books or papers, it is the duty of the liquidator to give him not only access to them, but to give him every assistance and facility in finding out which are the relevant books and papers he requires; and if the liquidator has already ascertained any books or papers bearing on the subject, he should frankly place this information at the service of the party.

The examination proceeds on p. 41:

Q. Would you give me particulars relating to the item of $3,846.70? A. Telegrams, $16.69; light for the office, $59.98.

Q. Which office? A. Prudential office the Victory Building. Stationery, $101.05; rent, $2,130.00

Then on p. 43:

Q. Give me the balance of that expense? A. Postage, $428.00; Janitor, $246.00, that is janitor and cleaning; Telephone, $196.97; business tax, $116.00; moving, $52.50.

Q. That is moving from where? A. From the Keewayden Building to the Victory Building. Printing, $408.00.

Q. Printing what? A. The necessary stationery and forms and circulars and anything required. Insurance, $40.45.

Finally, on pp. 54 and 55 it appears that the liquidator sold off certain office furniture belonging to the Prudential Company and charged certain commission on the sales of it at Calgary, $21.90, and at Regina, $4.50, and Mr. Riley admitted that there might be other items credited by the liqui-

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dator to itself of the same nature at the above, amounting to not more than $100.

In deciding as to what are proper disbursements to be allowed to the liquidator, I find little or no authority. In *Parker & Clark on Company Law* at p. 435, the editors insert a form of affidavit from which I extract the following:

2. That now shown to me and marked Exhibit "A" to this my affidavit is a true and correct account of my dealings with the assets of the said Company and correctly sets out my dealings with same.

5. The disbursements which I have made in connection with the winding up of the said Company total $....., as shown in said Exhibit "A."

6. The amount is made up of the following payments:

(*a*) $..... paid the..... Bank under order of the official referee herein, for which payment was received the securities held by the..... Bank and valued by them at the said sum.

(*b*) The sum of $..... paid ..... representing the costs of.....'s solicitors and paid to them under an order of the said official referee herein.

(*c*) The sum of $.....for rent.

(*d*) The sum of $.....for taxes and insurance.

(*e*) The sum of $..... paid ..... of which.....were the costs of the Company payable under the winding-up order, the remaining $.....being the costs of.....on taxation herein, payable under the direction of the said official referee.

8. The disbursements in paragraph five are my total disbursements in connection with the estate and deducting this amount from the total amount of assets received by me, there is left in my hands for payment to creditors the.....sum of $.....

I do not think it is necessary, for the purposes of the present application, to express any decided opinion upon the charge of $9,361.25 made by the liquidator for salaries paid to Mr. McDougall and the two stenographers.

With regard to the sum of $1,950 which the liquidator credits to itself for office rent in the Victory Building, I have a good deal of doubt.

When the liquidator applied for interim remuneration in February, 1918, a statement was filed setting forth some very good reasons to justify the granting of such remuneration. No such statement has been produced on the present application covering the period between February, 1918 and the present time; but possibly counsel for the liquidator considered

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the former statement to be sufficient for his purposes. From it I extract the following:

> The Managing Director also visited the Provinces of Alberta and Saskatchewan in which are located the majority of the shareholders of the company as also the major portion of the mortgage assets of the estate, and organized a thorough inquiry into the standing of the various debtors who had been fixed on the list of contributories, secured valuations and passed upon the various mortgages and outlined a policy to be pursued as to the realization of the securities and collection of the debts.
>
> In this connection it would point out that in view of the branch office affiliations of the Northern Trusts Company throughout the West, it has been possible to not only effectively liquidate these securities with a minimum of expense, but has also very materially assisted in the matter of collections from contributories, in a manner which would not be possible without such facilities.

There are now several companies in operation which perform the duties of liquidators and trustees. It is recognized that these companies have commodious offices, careful managers and clerks, and all other facilities for securing the prompt and efficient winding-up of estates placed in their hands. It may well be that if an expert financial man were selected as the liquidator of a company it would be reasonable and proper to allow him to rent one or more additional rooms to those comprising his office, and to allow the rent he paid as a disbursement, and also any additional clerks he might have to employ. But this does not apply to companies whose business it is to act as liquidators. In the present instance the liquidator was not obliged to rent any extra room at all. The Victory Building is owned by the Northern Trusts Company and the Canadian Fire Insurance Company. There is no evidence to show how this ownership is arranged and in the absence of evidence it is reasonable to suppose that each of these companies owns that portion of the building in which its own particular business is carried on. I cannot think that under such circumstances the Northern Trusts Company had any right to pay itself $50 a month for rent from that portion of their own office which they devoted to the work of the company in liquidation, unless under the sanction of the Court.

I have also considerable doubt as to the propriety of charging against the Prudential Life Insurance Company all the salaries paid to Mr. McDougall and the two stenographers

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in connection with the winding-up. Mr. McDougall appears to have performed most of the work of the liquidation.

The various charges for light, stationery, postage, janitor, telephone, etc., appear to be wholly outside the disbursements set forth in the form of affidavit given in *Parker & Clark*. That of course does not decide the impropriety of such charges but it does cast much doubt upon the propriety of admitting them as disbursements.

There is no evidence to show, for instance, that the janitor was paid any additional wages by reason of the liquidation.

For the purposes of the present application and having regard to *The King's Bench Act,* R.S.M., 1913, ch. 46, sec. 25 (*g*), I hold that the following items appropriated by the liquidator to itself are improper and should be replaced to the credit of the special account of the company in liquidation:

Re item $679.67	$ 321.25
Re item $4,793.44, Commission paid at Regina	1,996.15
Re item Commission Paid at Calgary	902.62
Collection of Rents at Moose Jaw	56.35
Selling Furniture at Calgary	21.90
Selling Furniture at Regina	4.50
	$3,302.77

With regard to the item of $1,200 paid to Mr. Hudson without taxation and without the sanction of the Court, I do not doubt that the liquidator considered it wise to settle the claim at those figures. The payment was irregular, but it is open to the liquidator either to have the bill taxed or to show to the Court facts justifying a compromise of the claim at the above figures.

I express no decisive opinion as to the charges for rent, salaries, interest, inspection of property, and for general office expenses. They can be dealt with on some future application for remuneration.

I would suggest that the parties interested in these disbursements furnish to the Court on such application, authenticated extracts from the accounts for disbursements filed in a few prominent cases, both here and in Ontario, showing their al-

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lowance or disallowance. The items regarding the propriety of which I have expressed my doubts are items which must occur in almost every liquidation; and it would greatly facilitate uniformity of practice to have a reported decision as to whether all or any of them are payable to the liquidator in addition to his remuneration.

I am of opinion that the liquidator has failed to support its application for further interim remuneration by adequate material therefor; and that the liquidator, by appropriating the commissions above disallowed, has disentitled itself to succeed on the present motion.

The liquidator's motion will be dismissed with costs, and the shareholders' motion, including the examination of Mr. Riley, will be allowed with costs.

Under ordinary circumstances these costs would be directed to be paid out of the assets of the Company but having regard to the commissions appropriated by the liquidator, and the attitude adopted by its manager in resisting reasonable and necessary discovery, I think it would not be right to impose any of the above costs upon the estate. They must be paid by the liquidator personally.

Application dismissed with costs; shareholders' motion allowed with costs.

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COURT OF APPEAL 1920

STEWART V. RICHARDSON SONS & COMPANY, LIMITED

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

Contracts—Mercantile Law—Estoppel—Agency—Shipper of Goods Handing Bill of Lading to Third Person—Fraudulent Use Thereof—Consignee Paying Third Person Proceeds of Goods—Liability of Consignee to Shipper.

Mere possession of a bill of lading in the hands of a person who has intervened between the original shipper and the consignee and is in no way identified with the transaction except by possession of the document, does not give him any authority to give a valid discharge of the money payable by the consignee.

Plaintiff consigned to defendants a carload of wheat and asked P. to notify them of the shipment. P. did not do so but informed B. Co. who falsely wrote defendants that the car was in error consigned to them instead of to B. Co. and asked defendants to watch the car and advise it when inspected. Defendants later notified B. Co. of the grade and outturn of the wheat. B. Co. told plaintiff who complained of shortage in outturn and called at the office of B. Co. and made a declaration claiming shortage and at B. Co.'s request left with it his bill of lading for the purpose of the claim. B. Co. then wrote defendants enclosing the bill of lading and declaration as to shortage and falsely said it had made settlement for the car and asked for settlement from defendants. There was no endorsement or direction on or accompanying the bill of lading, and the name of B. Co. nowhere appeared thereon. Defendants sold the wheat and remitted the proceeds to B. Co. which became insolvent.

Held plaintiff was entitled to recover the proceeds of the wheat from defendants; plaintiff was not estopped in respect of the subsequent conduct of B. Co., either by P.'s conduct or by handing the bill of lading to B. Co.; P.'s disclosure that plaintiff had consigned the wheat to defendants was an innocent piece of information not expected to be used for a fraudulent purpose; plaintiff in handing the bill of lading to B. Co. did not authorize it to deal with the wheat but only to make claim for shortage; B. Co.'s mere possession of the document gave it no right over the goods; the circumstances, especially the absence of anything on or accompanying the bill of lading indicating B. Co.'s ownership should have put defendants on enquiry; and therefore sec. 2 of 6 Geo. IV., ch. 94, even if in force in Manitoba (as to which Cameron, J.A. expressed strong doubt) did not apply.

ARGUED: 10th May, 1920.
DECIDED: 10th June, 1920.

Statement.

APPEAL by defendants from judgment of Macdonald, J., in favour of plaintiff in an action to recover the value of a carload of wheat. Appeal dismissed with costs.

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PERDUE, C.J.M.

J. B. Coyne, K.C., for defendant, appellant.

G. R. Coldwell, K.C., for plaintiff, respondent.

PERDUE, C.J.M.—This is an action to recover the value of a carload of wheat consigned by the plaintiff to the defendants. Macdonald, J., who heard the case, decided it in favour of the plaintiff and entered judgment for $1,854.81. The parties agreed as to the main facts which are embodied in the following admissions put in at the trial as Ex. 1:

ADMISSIONS:

The facts about which there is no dispute are:—

(1) The plaintiff is a farmer residing at Ralston, Manitoba, and the defendant is a Dominion Company, with office in the City of Winnipeg and carrying on business in the Province as Grain Merchants, and licensed under the Grain Act as commission merchants and track buyers.

(2) The plaintiff loaded a car of No. 2 Northern Wheat at Ralston, Manitoba, and shipped it on November 13th, 1917, consigned to Port Arthur to the order of the defendants, and the plaintiff received a bill of lading therefor from the Canadian Northern Railway.

(3) The car was delivered on November 27th by the C.N.R. to the Port Arthur Elevator Company, the outturn being 894 bushels of No. 2 Northern Wheat and 1105 pounds of screenings. The Port Arthur Company made out a warehouse receipt for the wheat in the name of the defendants on November 28th and notified the defendants of the outturn. The price of wheat was fixed at that time at $2.18 Fort William, for that grade, No. 2 Northern, per bushel.

(4) The Brandon Grain Company bought and sold grain and had a track buyer's license for the year beginning September 1st, 1917, under the Grain Act.

(5) On November 14th, 1917, the Brandon Grain Company wrote to the defendants:

"We have been advised today that C.N.R. car of wheat No. 70958 shipped from Ralston was billed to your order in place of ours, and we shall be glad if you will watch this car and advise us the day that it is inspected."

(6) On November 29th the defendants notified the Brandon Grain Company of the grade and outturn of the wheat.

(7) Within a few days his brother informed the plaintiff that the Brandon Grain Company had phoned to say that the car ran 894 bushels No. 2 Northern and 1105 pounds of screenings. The plaintiff claimed there was more wheat in the car.

(8) On December 18th the plaintiff came to Brandon, called at the Brandon Grain Company office, signed a declaration as follows:

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"Brandon. Authorized Capital $40,000.00. Winnipeg.

"BRANDON GRAIN COMPANY, Limited.

"Successors to JOHN R. BRODIE.

"Direct Private Wire with Winnipeg, Chicago & Minneapolis.

"Phone 241. Head Office, Opposite Post Office
Brandon, Man.

"I hereby certify that I loaded into C.N.R. Car. No. 70958 not less than one thousand bushels of wheat and I only received outturns for eight hundred and ninety-four bushels. I shall be glad if you will look into this and see if you can recover the difference from the Canadian Northern.

"Declared before me at the City of Brandon, in the Province of Man. this 18th day of Dec. 1917.

[Sgd.] A. Stewart.

"[Sgd.] A. J. Abbey,
Commissioner."

and left with the Brandon Grain Company his bill of lading.

(9) On the same day the Brandon Grain Company wrote the defendants and enclosed the documents referred to:—

"We enclose herewith Bill of Lading covering C.N.R. car No. 70958 along with Affidavit as to shortage. We have made settlement for this car and shall be glad if you will forward settlement by return."

(10) On December 19th the defendants delivered the bill of lading, after endorsing the same as now appears on the bill, to the Port Arthur Elevator Company, paid freight, interest and storage and received the Warehouse Receipt. On the same day the defendants sold the wheat to the Wheat Export Company and the screenings to the Port Arthur Elevator Company and endorsed the Warehouse Receipt to the purchasers. The Defendants received payment therefor and remitted the proceeds to the Brandon Grain Company, $1,860.81.

(11) On January 21st, 1918, A. J. Facey, Manager & Secretary-Treasurer of the Brandon Grain Company disappeared and the Company ceased to carry on business.

(12) On January 28th the plaintiff's solicitors wrote to the defendants enquiring about the car, referred to the shortage in weight which he claimed and asked how the matter then stood.

(13) The plaintiff claims the defendant converted his wheat and asks damages and other claims.

The bill of lading referred to in the above admissions is in the form approved by the Board of Railway Commissioners by order No. 14591 of August 18, 1911. It is signed by the plaintiff as shipper and by the agent of the Canadian Northern Railway Company at Ralston. On its face it consigns to the defendants at Port Arthur car No. 70958 purporting to contain 1,000 bushels of wheat. The only indorsement on the bill is one made by the defendants to the Port Arthur elevator.

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The name of the Brandon Grain Company does not appear anywhere on the bill.

The plaintiff states that on the day he shipped the grain he requested a friend, one Palmer, to notify the defendants of the shipment and for this purpose he gave him the number of the car and other particulars. Palmer says he did notify the defendants as requested but the trial Judge is convinced this is not the case. Palmer appears to have had many dealings with the Brandon Grain Company and instead of notifying the defendants of the shipment he sent the information to that company. The defendants show that they received no notification from the plaintiff. The Brandon Grain Company received from some source particulars of the shipment so that its manager became possessed of the information which enabled him to write to the defendants the letter of November 14, and prepare the way for the fraud that he subsequently carried out. Palmer, no doubt, was the source of this information. But the fact that he did not notify the defendants of the shipment as requested by the plaintiff and without authority sent the particulars to another person, does not in itself create an estoppel against the plaintiff in respect of the subsequent conduct of that person. The disclosure of the fact that the plaintiff had consigned from Ralston a carload of wheat to the defendants is an innocent piece of information. That it would be afterwards used as the instrument of a fraud was not to be expected. No authority was at any time given by the plaintiff to the Brandon Grain Company to sell, dispose of, or otherwise deal with the wheat in question. The sole authority conferred on that company or its officers was to make claim on his behalf against the railway company for the shortage in the out-turn from the car and to adjust the loss. It was for this purpose alone that he left the bill of lading with the Brandon Grain Company.

No authority was given by the plaintiff to the defendants to sell the wheat. They sold it under what they assumed to be instructions from the Brandon Grain Company. They sent the proceeds of the sale to that company although its name did not appear either on the front or the back of the bill of lading. The close relationship of the defendants with the

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Brandon Grain Company, they being preferred shareholders to a large amount and exercising more or less supervision over its affairs, would tend to lull suspicions that would have arisen had they been dealing with strangers. There were suspicious circumstances appearing in the transaction which should have put the defendants on enquiry before they parted with the proceeds of the wheat. In addition to the fact that the Brandon Grain Company's name does not appear anywhere on the bill of lading and that the grain had been consigned directly to the defendants, the company's letter of December 18, contains this statement: "We have made settlement for this car shall be glad if you will forward settlement by return." Now if the car belonged to the company, why was it necessary to state that they had made settlement for it? They say they have made settlement, presumably with the shipper, although they enclose with the letter a document called an "affidavit" made by him claiming a shortage of over a hundred bushels. This document is set out in par. 8 of the admissions. The plaintiff states in it that he "only received out-turns for eight hundred and ninety-four bushels." This showed that he was interested in the out-turn from the car when it was unloaded at Fort William, notification of which was sent to the defendants and by them to the Brandon company. The document is written on a sheet of the Brandon company's letter paper under their letter heading. It is presumably addressed to them. It contains this request: "I shall be glad if you will look into this and see if you can recover the difference from the Canadian Northern." That is, the plaintiff, the shipper, desires them to recover for him the shortage on his carload of wheat. The defendants put in a claim against the railway company on behalf of the Brandon Grain Company for shortage amounting to $159.10.

The defendants rely on the fact that the plaintiff handed his bill of lading to the Brandon company and by so doing enabled its manager to commit the fraud. They rely upon the Imperial statute, 6 Geo. IV. ch. 94, sec. 2. The effect of that section is as follows:

> Any Person or Persons intrusted with and in Possession of any Bill of Lading * * * * shall be deemed and taken to be the true Owner or Owners of the Goods * * * * described and mentioned in the

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said * * Documents * * * so far as to give validity to any Contract or Agreement thereafter to be made * * * by such Person or Persons so intrusted and in Possession as aforesaid, with any Person * * * for the Sale or Disposition of the said Goods * * * * * Provided such Person [the purchaser] * * * shall not have Notice by such Documents or either of them, or otherwise, that such Person or Persons so intrusted * * * are not the actual and *bona fide* Owner or Owners,* * * of such goods * * * any Law, Usage or Custom to the contrary * * * notwithstanding.

In *Cole v. North Western Bank,* L.R. 10 C.P. 354, at p. 363, 44 L.J. C.P. 233, Lord Blackburn said:

The possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. * * * * The transfer of the document of title by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession.

He points out the general purpose of 6 Geo. IV. ch. 94 and other Factors' Acts was to make it the law that where a third person has entrusted goods, or documents of title to goods, to an agent, who in the course of such agency sells or pledges the goods he should be deemed by that act to have misled any one who *bona fide* deals with the agent and makes a purchase from him or an advance to him, without notice that he was not authorized to sell or procure an advance.

I will assume, for the purpose of this case, but without deciding the point, that sec. 2 of 6 Geo. IV. ch. 94, was introduced into Manitoba as a part of the English law as it stood on July 15, 1870: R.S.M., 1913, ch. 46, sec. 11. How then does this enactment protect the defendants? The proviso in the section excludes from the protection afforded by it persons who have notice by the documents, or otherwise, that the person entrusted with the bill of lading, etc., is not the actual owner. In *Johnson v. Credit Lyonnais Co.,* 3 C.P.D. 32, at p. 45, 47 L.J. C.P. 241, Bramwell, L.J., says:

It [sec. 2] provides that it shall not apply, where by the document or otherwise, there is notice that the person intrusted is not the true owner of the goods. So that possession by A. of a bill of lading to the order of B., would not be within the section. * * * * * I believe the documents specified in the statute always mention the name of the person entitled, so that if the true owner has indorsed the document, or allowed it to be made out in another's name, there is ground for saying that he is by his own act no longer the true or apparent owner of the goods, or

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has given the power or apparent power of disposing of these goods to the holder of the warrant.

Now the bill of lading in the present case shows that the plaintiff has consigned a carload of wheat to the defendants. There was no indorsement, order or direction of any kind either upon the document or accompanying it which in any way affected the terms of it or gave the Brandon company authority to receive the proceeds of the carload. According to the bill of lading the owner of the wheat is either the plaintiff or the defendants. The Brandon Grain Company in no way appears on the bill and their possession of the document gives them no right over the goods mentioned in it. They were in the position of a person who had illegally obtained possession of a cheque or promissory note payable to another person and not indorsed.

I think the bill of lading itself furnished notice to the defendants that the Brandon company was not the owner of the wheat. That company's letter of December 18, and the document of same date signed by the plaintiff gave notice to the defendants that the plaintiff still had or claimed to have an interest in the goods.

The Brandon Grain Company had a track buyer's license under *The Canada Grain Act*, 2 Geo. V., ch. 27 (d), for the year 1917. By sec. 219 of the Act certain duties are imposed on every licensed track buyer, one of which is that he shall deliver to the vendor of each carload of grain a grain purchase note, retaining a duplicate of it himself. This note amongst other matters of information shall express upon its face an acknowledgment of the receipt of the bill of lading issued by the railway company for such carload shipment, the amount advanced on account, etc. Also the vendor shall indorse upon this grain purchase note his acceptance of the terms of the sale and his receipt for payment of the money advanced. When the defendants found the bill of lading in the condition in which it was, they should have demanded inspection of the duplicate purchase note which, if there were one, would have given the particulars of the purchase. The inquiry in this regard would have disclosed the fraud that was being perpetrated.

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CAMERON, J.A.

I think the trial Judge arrived at the proper conclusion and that the appeal should be dismissed with costs.

CAMERON, J.A.—The defendants contend that they were justified in remitting the proceeds of the sale of the car of wheat in question to the Brandon Grain Company as they could look to the *indicia* of authority only which the grain company possessed in the bill of lading. On that bill of lading the plaintiff appeared as shipper and the defendants as consignees.

Reliance is placed on the *Factors Act,* 6 Geo. IV. (1825) ch. 94, sec. 2, which provides: [See *ante* p. 485].

For the first time in this Court at any rate it is alleged that this Act is in force in this province. The observations of Chief Justice Haliburton of Nova Scotia quoted in *Clement's Canadian Constitution,* p. 277, are instructive.

> Every year should render the Courts more cautious in the adoption of laws that had never been previously introduced into the colony, for prudent Judges would remember that it is the province of the Courts to declare what is the law, and of the legislature to decide what it shall be.

In *Reg. v. Porter,* 20 N.S.R. 352, at a much later date, the Supreme Court of Nova Scotia emphasized the need of caution enjoined by Chief Justice Haliburton and held that the English statute, 13 Geo. II., ch. 18, requiring a certain notice in *certiorari* cases, was not in force in that province. It was pointed out that that Act was not obviously applicable and necessary and that the provincial Legislature had undertaken to legislate in *certiorari* matters and had enacted many provisions of the English statutes, omitting those contained in the Act of Geo. II. This last observation is important and relevant in this case in view of our own provincial legislation on the subject of mercantile agents without any attempt to re-enact the above sec. 2, to which I shall subsequently refer.

I would refer to the judgment of Lord Watson in *Cooper v. Stuart,* 14 App. Cas. 286, 58 L.J. P.C. 93, where it was held that the English common-law rule against perpetuities could not be invoked in New South Wales to hamper the Crown in dealing with public lands. Lord Watson then

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quotes the oft-quoted observation of Sir William Blackstone that

> colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people * * * * are neither necessary nor convenient for them, and therefore are not in force.

The Act of 6 Geo. IV., ch. 94, was amended in 1842 by 5 & 6 Vict. ch. 39. In 1889, 52 & 53 Vict. ch. 45, these two Acts were repealed as well as the Act of 4 Geo. IV. and the Act of 1877, 40 & 41 Vict. ch. 39. Sec. 2 of 6 Geo. IV., ch. 94, is reproduced with amendments in sec. 2 of the Act of 1889.

In the English *Sale of Goods Act,* 1893, 56 & 57 Vict., ch. 71, we find secs. 8 and 9 of *The Factors Act* of 1889 reproduced with a slight alteration. By subsec. 3 of sec. 25 of the English *Sale of Goods Act,* 1893, it is provided that in it the term "mercantile agent" has the same meaning as in *The Factors Act.* In our *Sale of Goods Act,* ch. 174, R.S.M., 1913, sec. 25 of the English *Sale of Goods Act* is reproduced as sec. 26. There is an added subsec. 3, of no importance here. By subsec. 4 the term "mercantile agent" is defined as it is defined in sec. 1 of the English *Factors Act* of 1889. In our Act we have in sec. 2 a definition of the term "document of title to goods" not found in the English *Sale of Goods Act* but taken from sec. 1 of *The Factors Act* of 1889, which in turn was taken from sec. 4 of the Act of 1842, 5 & 6 Vict., ch. 39.

In the case of the Act of 6 Geo. IV., ch. 94, we have therefore this situation: That Act, passed in 1825, was repealed in 1889. The Court of Queen's Bench was constituted by the province of Manitoba in 1874 by an Act providing that the Court should decide all matters of controversy relative to property and civil rights according to the laws existing in England as the same were on July 15, 1870, so far as the same could be made applicable to matters relating to property and civil rights in the province. This enactment has been re-enacted from time to time and is now sec. 11, ch. 46, R.S.M., 1913. In 1889 the English Act, repealing ch. 94, 6 Geo. IV.,

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enacted secs. 8 and 9 as parts of the substituted Act, and these sections are reproduced in our *Sale of Goods Act*, as pointed out. In our *Sale of Goods Act* we also find the definition of "mercantile agent" as set out in the English Act of 1889 and of "documents of title" as found in the same Act and in the Act of 1842.

At common law, a person in possession of goods could not confer on another, either by sale or pledge, any better title to the goods than he himself had.

There is an exception in the case of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud, which did not preclude the owner when there was notice.

And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. [Blackburn, J. in *Cole v. North West Bank*, L.R. 10 C.P. 354, at pp. 362-3, 44 L.J.C.P. 233.]

Now sec. 2 of 6 Geo. IV., ch. 94, made an important alteration in the law as by it the possession of bills of lading or other documents of title gave a power of selling or pledging the goods to those dealing *bona fide* with the possessor beyond any which by common law the possession of the goods gave (Per Blackburn, J., *ibid.* 367).

Is it possible that sec. 2 of the Act of 1825, repealed in England in 1889, never re-enacted or recognized by our Legislature, which has however re-enacted in substance other English legislation on the same subject, is nevertheless in force in this province? Its existence as part of the law of this land has never been heretofore publicly asserted. We must proceed cautiously in assuming a function that really belongs to the Legislature which has hitherto abstained from exercising it in this particular matter, and I feel impressed with the view that sec. 2, in so far as it is an alteration of the common law, is not in force in this province. In my view of the case, however, it is not necessary to make an express holding on this point.

If we take the definition of "document of title" as found in the English Act of 1842 (which is no doubt declaratory on the subject) can the bill of lading in this case be said to

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be a document used in the ordinary course of business as proof of the possession or control of goods? "Possession" or "control" obviously means possession or control by the holder for the time being of the document and in this case the document indicates no proof of possession or control by the Brandon Grain Company, as on its face it shows the plaintiff as the owner of the wheat, and the defendants as the consignees. It does not name the Brandon Grain Company. It most certainly does not authorize or purport to authorize, by endorsement or delivery, the possessor of the document to transfer or receive the wheat thereby represented.

In *Johnson v. Credit Lyonnais Co.* (1877) 3 C.P.D. 32, 47 L.J. C.P. 241, Bramwell, L.J., subjects the language of the English statutes to a critical examination which is of the greatest interest and value, commencing with the Act, 4 Geo. IV., ch. 83. In dealing with 6 Geo. IV., ch. 94, he analyzes sec. 2, which was that on which the case there before the Court depended. He says at p. 45 (3 C.P.D.):

> This section applies to all cases where persons are intrusted with, and in possession of, bills of lading * * * which suppose a right [that is, I take it, create a presumption of a right] to the possession of goods. It does not mention "goods" themselves. It provides that it shall not apply, where by the document or otherwise, there is notice that the person intrusted is not the true owner of the goods. So that the possession by A. of a bill of lading to the order of B., would not be within the section.

This last sentence is, in my judgment, conclusive. Outside the powers conferred by the possession of the documents by the statute, the mere possession of them by the agent is, so far as the defendants are concerned, meaningless. It confers no rights on them other or greater than would be given by the possession of the goods, to which at common law, the person in possession can give no better title than he himself had. These documents are not within the statute and by virtue of them the Brandon Grain Company could confer no better title than it itself had which was none at all.

Now, did the plaintiff by his acts or conduct enable the Brandon Grain Company to hold itself out as having authority to receive the proceeds of the consignment of wheat? We may call this estoppel or an application of the rule that where

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one of two innocent persons must suffer, the person who rendered it possible for the wrongdoer to do the wrong, should suffer rather than the one who suffers from the agent having the opportunity.

In *Johnson v. Credit Lyonnais Co., supra,* the plaintiff had left both the tobacco and the *indicia* of title, the dock-warrants, with the broker and dealer from whom he had purchased the goods. It was contended: (1) That by so doing he was estopped from denying the right to deal with the goods; and (2) That even if the property did not pass the plaintiff was guilty of negligence and the defendants counterclaimed for damages. As to the first ground Chief Justice Cockburn held that the leaving of the goods or the *indicia* of title with the vendor did not in the circumstances divest the owner of his property or estop him from asserting his right to it. (p. 40 [3 C.P.D.]): As to the counterclaim for negligence, the Chief Justice held:

> The law is in my opinion, correctly stated by Blackburn, J., in *Swan v. North British Australian Company,* 2 H. & C. 175, at 181, 32 L.J. Ex. 273, where, after referring to what was said by Parke, B., in *Freeman v. Cooke,* 2 Ex. 654, 18 L.J. Ex. 114, namely, that "negligence to have the effect of estopping the party must be the neglect of some duty cast upon the person guilty of it," he goes on to say: "This I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently, stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however, innocently purchased those goods from the thief, except in market overt." The same principle would obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is applicable here. The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owed no duty to the defendants—at least no duty which the law can recognize—either as individuals or as members of the general public. * * * This being so, I am of opinion that the negligence of the plaintiff neither estops him from claiming the goods in question from the defendants, nor gives the latter a counterclaim for the money which they have advanced to Hoffman on the security of the goods.

Now, in that case the broker and dealer was in possession both of the goods and of the *indicia.* Here the Brandon Grain Company had the *indicia* only. There the negligence complained of was the omission by the owner to follow the

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prudent and usual course of having the goods in question transferred to his own name and the *indicia* transferred to him. Here it is alleged that the plaintiff was in fault in omitting to notify the defendants of the facts. Obviously the facts in the *Credit Lyonnais Case, supra,* were stronger against the plaintiff's assertion of his rights of ownership than in this case. The plaintiff's position and rights in this matter were disclosed on the bill of lading. This he retained in his possession until he was notified of the out-turn of his grain and it was only then that he handed it to the Brandon Grain Company for the sole purpose of making a claim against the railway company for an adjustment of loss sustained by him owing to the shortage which appeared according to the railway company's return. The bill of lading was sent by the Brandon Grain Company to the defendants along with the plaintiff's declaration of loss. The defendants chose to shut their eyes to the contents of the documents before them and there was no duty whatever in the matter that I can see owed by the plaintiff to the defendants.

On the facts as found by the trial Judge the case is not within that class of cases where it has been held that where a principal intrusts his agent with the possession of the title deeds of any property and authorizes him to raise money on the security thereof, a security given by the agent for a larger amount than that authorized who fraudulently appropriated the difference is valid as against the principal. See *Brocklesby v. Temperance Permanent Building Society,* [1895] A.C. 173, 64 L.J. Ch. 433. This case comes rather within *Farquharson v. King,* [1902] A.C. 325, 71 L.J.K.B. 667. The Brandon Grain Company had no authority to raise money on the wheat. They had no authority to dispose of it. By the terms of the bill of lading that could only be done by the defendants. The bill of lading came into the Brandon Grain Company's possession merely for the purpose of being used in connection with the plaintiff's claim for shortage and his letter in reference to it contains no authority to the railway company to pay the proceeds to any agent. The defendants alone were by the terms of the bill of lading authorized to receive the proceeds of the sale and no authority, express or

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CAMERON, J.A.

to be implied from the acts or conduct of the plaintiff was given them to pay the amount to any other person than the plaintiff.

The right and title to the grain and its proceeds remained in the plaintiff throughout and he is entitled to his money. I would affirm the judgment of Mr. Justice Macdonald and dismiss the appeal.

FULLERTON, J.A.—At common law the possession of a bill of lading confers no greater power than the possession of the goods themselves and a person in possession of goods can confer no better title than he himself has.

If, however,

> the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited. [Blackburn, J. in *Cole v. North Western Bank*, L.R. 10 C.P. 354, at p. 363, 44 L.J.C.P. 233.]

In *London Joint Stock Bank v. Simmons* [1892] A.C. 201, at p. 215, 61 L.J. Ch. 723, Lord Herschell said:

> The general rule of law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner had so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner.

Sec. 23 of *The Sale of Goods Act*, R.S.M., 1913, ch. 174, provides as follows:

> Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, ***unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.***

As I see it, the only question in this case is whether the plaintiff is, by his conduct, precluded from denying the authority of the Brandon Grain Company to authorize the sale of the grain in question and to receive the proceeds.

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The carload of wheat in question was shipped from Ralston, Manitoba, consigned to the order of the defendants on November 13, 1917. On the same day plaintiff says he requested one Palmer to write to the defendants and advise them of the shipment. Palmer, who was called by the plaintiff, stated in his evidence that he wrote to the defendants as requested but the learned trial Judge has found that he in fact wrote to the Brandon Grain Company. The letter was not produced at the trial but secondary evidence was given of its contents. Peacock, the president of the Brandon Grain Company, says that the letter stated he (Palmer) was getting the car from Stewart and getting him (Facey, the manager of the Brandon Grain Company) to handle the car. On November 14, the Brandon Grain Company, wrote to the defendant as follows:

> We have been advised today that C.N.R. car of wheat No. 70958 shipped from Ralston was billed to your order in place of ours, and we shall be glad if you will watch this car and advise us the day that it is inspected.

The car was delivered to the Port Arthur Elevator Company on November 27, the out-turn being 894 bushels of No. 2 northern wheat and 1,105 pounds of screenings. The defendant was advised of the out-turn and on November 29 notified the Brandon Grain Company. Peacock telephoned the out-turn to the store at Terence run by a brother of the plaintiff and later the plaintiff called Peacock on the telephone and asked him about the grain. Plaintiff said there must be some mistake as "the car had been filled up about the wheat line and they generally run over a thousand bushels." Peacock replied that he had heard nothing about the shortage but would send papers up for the plaintiff to sign making a claim, which he subsequently did, but as there was some mistake in them the plaintiff did not sign them. Plaintiff further says that Peacock told him if he would send the shipping bill in to them there would not be any storage on the wheat. Plaintiff also says, "I did not say anything about that for I was not going to hold the wheat and storage did not matter." The fact is that the price of wheat in 1917 was fixed and there was no object in holding it.

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Judgment.

FULLERTON, J.A.

About a week after the telephone conversation on December 18, 1917, plaintiff went to Brandon and he and his brother visited the office of the Brandon Grain Company. Plaintiff's account of the interview he there had with the officers of the Brandon Grain Company is as follows:

Q. Tell us what occurred with Peacock? A. He [his brother] introduced me to Mr. Peacock when he came in there and I showed him these papers where the mistake was and he turned them over to Mr. Facey and introduced him to me at the time and he took these papers and re-wrote them again.

Q. Did you sign them then? A. I signed the paper.

The paper which he signed is on the letter paper of the Brandon Grain Company and reads as follows:

I hereby certify that I loaded into C.N.R. car No. 70958 not less than one thousand bushels of wheat and I only received outturns for eight hundred and ninety-four bushels. I shall be glad if you will look into this and see if you can recover the difference from the Canadian Northern.

[Sgd.] A Stewart.

Declared before me at the City of Brandon, in the Province of Man. this 18th day of Dec. 1917.

[Sgd.] A. J. Abbey, Commissioner.

Plaintiff says Facey asked him to leave the bill of lading which he did.

On the same day the Brandon Grain Company forwarded it together with the declaration to the defendant with the following letter:

Messrs. Jas. Richardson & Sons,
Winnipeg, Man.

Dear Sirs:

We enclose herewith Bill of Lading covering car No. 70958 along with affidavit as to shortage. We have made settlement for this car and shall be glad if you will forward settlement by return.

Yours truly,
Brandon Grain Co., Ltd.
Per F.

Acting on these instructions the defendant sold the wheat and remitted the proceeds to the Brandon Grain Company, which shortly afterwards made an assignment for the benefit of its creditors. The statement in the above letter that the Brandon Grain Company "have made settlement for this car" was false, the plaintiff never having received a dollar.

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FULLERTON, J.A.

The plaintiff had been farming for 25 years and during the last 10 years had been shipping grain by carloads, and was familiar with the methods of inspection, grading, storage, etc. He admits that he intended to sell the wheat in question promptly. He never communicated in any way with the defendant until after the Brandon Grain Company had assigned. Palmer, whom he says he requested to write to the defendant, wrote to the Brandon Grain Company. Plaintiff never asked Palmer if he had heard from the defendant and he himself never at any time received any communication from the defendant. Plaintiff had seen circulars of defendant the fall before, but admits there was nothing on them about the Brandon Grain Company representing the defendant. He further admits that no one connected with the Brandon Grain Company had ever told him that the latter company was the agent of the defendant, nor does he anywhere in his evidence say that he believed the Brandon Grain Company was such agent. When the Brandon Grain Company advised him of the out-turn, one would naturally think he would at once inquire what that company had to do with his grain. He admits he made no inquiries but he visited their office and signed the declaration in connection with the alleged shortage. He also took with him his bill of lading and handed it over to the Brandon Grain Company on request. He says no reasons were given for the request, but he supposed the bill of lading would be required in connection with his claim for shortage. The learned trial Judge has found, and his finding is fully supported by the evidence, that the defendants acted in good faith in paying over the proceeds of the car to the Brandon Grain Company.

I was at first strongly impressed with the view that the plaintiff was estopped by his conduct from denying the agency of the Brandon Grain Company, but a consideration of the provisions of the Dominion *Grain Act* has convinced me that there is no estoppel in this case.

By *The Canada Grain Act,* ch. 27, 2 Geo. V., (Dom.) sec. 2, subsec (*t*) a "commission merchant" is defined as follows: "'Commission merchant' means any person who sells grain on commission." Under the provisions of secs. 210 to 213 any

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person desiring to carry on the business of grain commission merchant is required to make application to the Board of Grain Commissioners for Canada for a license to sell grain on commission and before such license is issued a bond is required to be given for the benefit of persons entrusting such commission merchant with consignments of grain to be sold on commission.

The Brandon Grain Company, to the knowledge of the defendant, had no such license and therefore could not legally sell the grain in question as the agent of the plaintiff on the terms of receiving a commission.

Moreover the statement in the letter from the Brandon Grain Company to the defendant of December 18, above quoted, that the Brandon Grain Company "have made settlement for the car" would be notice to the defendant that any agency which may have previously existed in reference to the car had ceased and that the Brandon Grain Company had purchased the car and were claiming the proceeds as such purchaser.

The Brandon Grain Company had, however, a track buyer's license. A "track-buyer" under *The Canada Grain Act* "means any person, firm or company who buys grain in car lots on track." They also are required to file a bond and take out a license. By sec. 219 of the Act a track buyer is required to

> deliver to the vendor of each carload lot of grain a grain purchase note, retaining himself a duplicate thereof; which note shall bear on its face the license season, the license number of such track buyer's license, the date and place of purchase, the name and address of such track buyer, the name and address of the vendor, the initial letter and number of the car purchased, the approximate number of bushels and kind of grain contained therein, and the purchase price per bushel in store at Fort William, Port Arthur or other destination; such grain purchase note shall also express upon its face an acknowledgment of the receipt of the bill of lading issued by the railway company for such carload shipment, the amount of cash paid to the vendor in advance as part payment on account of such car lot purchase, also that the full value of the purchase money shall be paid to the vendor immediately the purchaser shall have received the grade and weight certificates and the railway expense bill. Every such grain purchase note shall be signed by the track buyer or his duly appointed agent, and the vendor shall indorse his acceptance of the terms of the sale thereon as well as his receipt for payment of the money advanced him on account of such carload lot sale.

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Judgment.

FULLERTON, J.A.

Now, there are only two ways in which the Brandon Grain Company could have legally purchased the grain in question: (1) As licensed track buyers; (2) By paying the full purchase-price to the vendor before the time of the receipt of the grain, in which case under sec. 218, subsec. 3, a track buyer's license is not necessary.

Before paying over the proceeds of the car to the Brandon Grain Company it was clearly the duty of the defendant to require that Company to furnish evidence of the truth of their statement that they "had made settlement for the car." If the Brandon Grain Company had purchased the car as track buyers then the grain purchase note would be the evidence of the purchase. On the other hand, if they had paid for the car in full before the receipt of the grain, there should have been an assignment of the interest of the plaintiff in the bill of lading. The defendant accepted the statement of the Brandon Grain Company without any inquiry and without demanding any evidence of title. I think, under these circumstances they cannot resist the claim of the plaintiff.

I would dismiss the appeal with costs.

DENNISTOUN, J.A.—The plaintiff consigned a car of wheat to the defendants. The bill of lading showed the plaintiff as shipper. There were no indorsements or assignments to show an interest in any other person. The defendants received the wheat and sold it. Instead of accounting to the plaintiff for the proceeds they sent the money $1,854.81 to the Brandon Grain Company. The plaintiff did not receive it and the Brandon Grain Company being insolvent, the plaintiff has recovered judgment for the amount against the defendants.

The defendants appeal and it is clear that the onus is upon them of satisfying the Court that they were justified in making payment to the Brandon Grain Company, and in disregarding the shipper.

The trial Judge finds, and there can be no doubt upon the evidence, that the defendants were imposed upon by the Brandon Grain Company. That there was lying, fraud, and possibly theft which induced the defendants to treat the Brandon Grain Company as owners of the wheat and as such entitled to the proceeds of the sale.

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DENNISTOUN, J.A.

The defendants urge that the plaintiff Stewart and themselves being innocent parties it was Stewart who made it possible for the Brandon Grain Company to deceive the defendants and that the plaintiff should suffer the loss in accordance with the well-known rule.

In support of this contention the defendants say they had no communication with the plaintiff until after the money had been remitted to the Brandon Grain Company and that they received all the instructions upon which they acted, together with the bill of lading, which enabled them to deal with the grain, from the Brandon Grain Company, and had therefore a right to assume that they were entitled to the purchase-price of the wheat.

The Brandon Grain Company had written to the defendants, falsely and fraudulently, that the grain had been consigned to the defendants by the shipper in error, that the shipment was intended for the Brandon Grain Company. When they sent the bill of lading to the defendants they falsely said that they had settled for the grain. The defendants no doubt believed these statements. They were closely connected with th Brandon Grain Company, held a substantial portion of its stock, received monthly balance sheets of its affairs, and represented it on the Winnipeg Grain Exchange. These assurances were apparently sufficient to satisfy the defendants that the Brandon Grain Company should receive the proceeds of the grain when sold and they remitted the money without any enquiry as to why the bill of lading showed no indication of a transfer of the shipper's interest, or why it was not accompanied by some document to indicate that the shipper had parted with his right *ex facie documenti* to receive the sale price.

The defendants rely on the receipt of the bill of lading as in itself sufficient. They quote the statute, 6 Geo. IV., (1825) ch. 94, sec. 2, which provides: [See *ante*, p. 485].

Assuming for the purpose of the argument that this statute passed in England almost an hundred years ago is applicable to and in force in the province of Manitoba, the evidence shows clearly that it does not affect the case at bar.

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Judgment.

DENNISTOUN, J.A.

The word "intrusted" has been discussed in many cases and held to mean much more than mere delivery of possession of a document. In this case the Brandon Grain Company were never "intrusted" with the bill of lading for any such purpose as they put it to, nor was the document in order to enable them to use it as they did.

It was left with them for the purpose of having a claim made upon the railway company for a shortage in the grain which was alleged to have taken place in transit. It was not intended by the plaintiff that the grain should be sold at that time and it was not intended to give any assignment of the purchase-price to the Brandon Grain Company.

The statute does not apply because the bill of lading was not "intrusted" for the purpose claimed, and for the much stronger reason that its possession did not indicate that the Brandon Grain Company had acquired any right to receive the proceeds of the sale. Upon its face it showed that Stewart, the plaintiff, was the shipper and that he had neither indorsed it, nor attached a draft to it, as he would have done had he intended to transfer to the Brandon Grain Company his right to the money: *Johnston v. Credit Lyonnais Co.*, 3 C.P.D. 32, at p. 45, 47 L.J.C.P. 241; *Cole v. North Western Bank*, L.R. 10 C.P. 354, 44 L.J.C.P. 233; *Phillips v. Huth* (1840) 6 M. & W. 572, 10 L.J. Ex. 65; *Hatfield v. Phillips*, (1845) 9 M. & W. 647, 11 L.J. Ex. 425.

There is no question here as to the validity of the sale which the consignees made upon receipt of the bill of lading nor as to the title of any of the parties to the grain itself. We are concerned only with the payment of the money after the grain was sold.

As I understand the mercantile practice, when a shipper desires to part with the right to receive the price of goods which he consigns, he treats the bill of lading as the document which when in order carries title to the goods and passes that title to others, but the right to collect the debt is a chose in action which is distinct from and independent of the delivery of the goods and passes only by assignment. The shipper, therefore, when desirous of assigning his right to the price does so by attaching to the bill of lading a draft which indicates the

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payee, or by indorsing the bill of lading so as to show that he has parted with his right to payment as well as to the title to the goods, or by executing an independent memorandum of assignment, and until the consignee receives notice that the shipper has assigned his right to the price the consignee remits it to any other party at his peril.

I can find no authority that mere possession of a bill of lading in the hands of a person who has intervened between the original shipper and the consignee and is in no way identified with the transaction except by possession of the document, can give him any authority to give a valid discharge for the money payable by the consignee: *Daniel on Negotiable Instruments,* 6th ed., p. 1953; *Bennett on Bills of Lading,* pp. 19-20; *Porter on Bills of Lading,* sec. 496.

The defendants were deceived by the Brandon Grain Company but that was not due to any laches or negligence on the part of the plaintiff. The defendants relied on the letter sent them by the Brandon Grain Company to the effect that they had settled for the grain. An examination of the documents forwarded by the Brandon Grain Company to the defendants would have disclosed the fact that there was no evidence to corroborate this false statement, and that upon the face of the bill of lading the plaintiff had done nothing to divest himself of his right to the money which the document clearly showed to be his. I concur with the finding of the learned trial Judge that the defendants relied on the statements of their business associates the Brandon Grain Company in which they were principal shareholders with a representative, Mr. Davies, of their firm on the board of directors, and another representative, Mr. Withers, making regular inspection of the company's books of account. Had the defendants been dealing with strangers they would have scrutinized the documents submitted and declined to remit the money in their hands until the proper evidences of assignment were produced. The loss which has occurred was not due to the acts of Stewart but to their own misplaced confidence: Blackburn, J. in *Cole v. North Western Bank, supra,* at pp. 372, 373 (L.R. 10 C.P).

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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CHAMBERS—COURT OF APPEAL 1920

IN RE CROSSEN METAL WORKS, LIMITED

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

Mortgages—Companies—Landlord and Tenant—Distress under Mortgage—Distress for Interest—For Principal and Interest—For Principal Made Due under Acceleration Clause — Right of Liquidator of Mortgagor Company to Impeach Mortgagee's Right of Distress—Whether Right of Distress within Provisions of The Bills of Sale and Chattel Mortgage Act.

A mortgage on land contained the following two clauses: (1) "And for the purpose of better securing the punctual payment of the interest * * I the mortgagor do hereby attorn tenant to the mortgagee * * at a yearly rental equivalent to the annual interest secured hereby, to be paid yearly * * the legal relation of landlord and tenant being hereby constituted * *"; (2) "And further that if I shall make default in payment of any part of the said principal or interest at any day or time hereinbefore limited for the payment thereof it shall and may be lawful for them and I do hereby grant full power and license to the mortgagee to enter, seize and distrain upon the said lands * * and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of said principal and interest as shall from time to time be or remain in arrear and unpaid * * as in like case of distress for rent."

One year's interest amounting to $3,000 being in default the mortgagee gave notice under the acceleration clause in the mortgage declaring the principal of $50,000 due, and distrained for the whole principal and interest. A winding-up order was made in respect of the mortgagor company under the Dominion *Winding-Up Act*, and the liquidator disputed the mortgagee's right of distress.

Held, per Perdue, C.J.M. and Dennistoun, J.A., sustaining, on equal division of the Court, judgment of Galt, J., ([1920] 2 W.W.R. 908), while the agreement under the first clause was valid, the legal relationship of landlord and tenant being actually created thereunder at a rent reserved the same as the interest, which was fair and reasonable, and payable at stated times, the second clause was inconsistent with the actual attornment clause and merely aimed at conferring for further security a license to distrain for a debt; it was therefore impeachable by third parties, including a liquidator of the mortgagor company appointed under the Dominion *Winding-up Act;* even as against the mortgagor the clause, which should be construed strictly, did not give a right of distraint for principal made payable under the acceleration clause; also such a license to distrain came within the provisions of *The Bills of Sale and Chattel Mortgage Act.*

Per Fullerton and Cameron, JJ.A.: The words "As in the case of a demise of the said lands" and "as in like case of distress for rent" in the second clause showed clearly that the clause was not intended to create the relation of landlord and tenant, which had in fact been created by

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the previous clause, but gave a collateral license to distrain for arrears of interest and principal apart entirely from the existence of any tenancy; it was part of the contract between the parties and should be given effect to; it did not fall within the meaning of sec. 7 of *The Bills of Sale and Chattel Mortgage Act.*

ARGUED: 12th July, 1920

DECIDED: 5th August, 1920.

Statement.

APPEAL from the following judgment of Galt, J. modifying an order of the Master affirming a right of distraint. Appeal dismissed on an equal division of the Court, Perdue, C. J. M. and Dennistoun, J.A. for its dismissal, Cameron and Fullerton, JJ.A. for its allowance.

12th June, 1920.

GALT, J.—This is an appeal from an order made by the Master affirming the right of William J. Crossen to distrain upon the goods and chattels of the Crossen Metal Works Limited for the sum of $53,000 together with interest thereon from January 11, 1920, at the rate of six per cent. The following is an agreed statement of fact submitted on behalf of the liquidator, the company and of Mr. William J. Crossen and Mr. J. F. Davidson, solicitor for the creditors:

AGREED STATEMENT OF FACTS

The Winnipeg Steel Granary and Culvert Company, Limited, made its mortgage bearing date the 1st of March, A.D. 1919, and registered in the Winnipeg Land Titles Office on the 10th March, A.D. 1919, as instrument No. 404340, whereby it mortgaged its premises situated on Archibald Street, in the City of St. Boniface, in Manitoba, to William J. Crossen, to secure a loan of 50,000.00 Dollars (Fifty Thousand), payable to the mortgagee at Winnipeg on the 11th day of January, A.D. 1924, with interest at the rate of 6% per annum payable yearly on the 11th day of January.

By Order-in-Council of the Province of Manitoba, No. 31198, bearing date the 4th day of April, 1919, the name of the Winnipeg Steel Granary and Culvert Company, Limited, was changed to the Crossen Metal Works, Limited.

The said mortgage contains among others the following clauses:—

"And for the purpose of better securing the punctual payment of the interest on the said principal sum I, the mortgagor, do hereby attorn tenant to the mortgagee for the said lands, at a yearly rental equivalent to the annual interest secured hereby, to be paid yearly on each 11th day of January, the legal relation of Landlord and Tenant being hereby constituted between the mortgagee and me, the mortgagor.

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"And further that if I shall make default in payment of any part of the said principal or interest at any day or time hereinbefore limited for the payment thereof, it shall and may be lawful for them, and, I do hereby grant full power and license to the mortgagee to enter, seize and distrain upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of said principal and interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like case of distress for rent.

"It is also agreed between me and the mortgagee that if any default shall happen to be made in any payment of interest or principal or any moneys hereby secured or any part thereof, then in such case the principal money hereby secured and every part thereof shall at the option of the mortgagee become due and payable in like manner and to all intents and purposes as if the time herein mentioned for payment of such principal sum had come and expired."

On the 11th day of January, A.D. 1920, the matured instalment of interest amounted to $3,000.00 (Three Thousand Dollars), and no part of the same was then paid nor has since been paid.

On the 6th day of March, A.D. 1920, the said William J. Crossen by notice to the mortgagor and because of default in payment of the said interest declared the whole amount of principal and interest due and payable under the Acceleration provisions of said mortgage and forthwith demanded payment thereof.

Payment having been refused the said mortgagee thereupon through his Bailiff Francis W. Sheraton distrained the goods and chattels liable to be distrained for the sum of $53,000.00 (Fifty-three Thousand Dollars) and interest thereon from the 11th day of January, 1920, at the rate of 6% per annum, claimed to be owing to him under and by virtue of the said mortgage. The Bailiff forthwith after the said distress did on the said 6th day of March A.D. 1920, take an inventory of the said goods and chattels.

After the said distress had been levied and the inventory made, a petition was filed in the Court of King's Bench to wind-up the said Crossen Metal Works, Limited, under the Dominion *Winding-up Act*, and a Winding-up Order was subsequently made on the said petition and served on the mortgagee's Bailiff.

After receiving notice of the said Winding-up Order the mortgagee took no further steps, through his Bailiff or otherwise, but he remained in possession under the said distress until the 27th day of April, A.D. 1920, when he turned over to the Liquidator the said goods and chattels so distrained under and in compliance with the provisions of an order made by the Master herein dated the 26th day of April, A.D. 1920, which order provided among other things as follows:

"That the delivery of possession to the Liquidator by the said William J. Crossen shall be without prejudice to the rights, claims and demands, powers and privileges of the said William J. Crossen to the same extent as if he had continued in possession."

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GALT, J.

The appeal was very ably argued by Mr. Symington, K.C., on behalf of the liquidator and Mr. Coyne, K.C., on behalf of Mr. Crossen. Counsel intimated that an early decision was urgently required owing to the fact that every day's delay would occasion expense and add to the dislocation of the company's affairs. I will endeavour, therefore, to express the conclusion I have arrived at as briefly as possible.

It appears from the statement of facts that the mortgage in question was dated March 1, 1919, and covered the company's premises in St. Boniface. It was to secure a loan of $50,000, payable to William J. Crossen on January 11, 1924, with interest at the rate of six per cent, payable January 11, that is to say, the yearly interest would be $3,000. The mortgage contained the usual attornment clause whereby the company attorned as tenant to Mr. Crossen for the said loan a yearly rental equivalent to the annual interest secured thereby to be paid yearly on each 11th day of January. No objection was taken to this clause.

The question arises under the subsequent provision that in case of default in payment of any part of the principal or interest it should be lawful for the mortgagee and full power and license was granted to him to enter, seize and distrain upon the said lands, and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of said principal and interest as should from time to time be or remain in arrear unpaid together with all costs, etc., as in like case of distress for rent.

Then followed the acceleration clause, whereby if any default were made in payment of interest or principal the whole principal secured should at the option of the mortgagee become due and payable.

Default was made on January 11, 1920, and, on March 6, Mr. Crossen declared the whole amount of principal and interest payable. Payment having been refused Mr. Crossen distrained the goods and chattels on the premises as set forth in the agreed statement.

On March 8, a winding-up order was pronounced and the Commercial Loan and Trust Company was appointed provisional liquidator.

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Judgment.

GALT, J.

The question which has been submitted for determination is:

Whether the said William J. Crossen is entitled to proceed to realize according to law upon the said goods and chattels so distrained and to apply the proceeds thereof towards the payment of principal and interest of moneys due under said mortgage, and whether the said distress so levied was illegal or wrongful in whole or in part, and if so, to what extent, and also what, if any, rights the liquidator has as against the said mortgagee to take the said goods and chattels so distrained for application or for the benefit of unsecured creditors.

I am of opinion that the said distress was perfectly legal to the extent of the interest which fell due on January 11, viz., $3,000 (see *McDermott v. Fraser,* 25 Man. R. 298, 8 W.W.R. 196); but that the distress in respect of the principal, due Mr. Crossen under the acceleration clause of his mortgage, was not warranted in law. It is quite true that as between mortgagor and mortgagee the parties had a right to stipulate as they did. They are each estopped from denying the other's rights upon the footing of a relationship of landlord and tenant: See *Hobbs v. Ont. Loan and Debenture Company,* 18 S.C.R. 483. But this estoppel is not binding upon third parties. Mr. Justice Strong says at p. 501:

The authorities, however, have, beyond doubt or question, established the validity of such agreements in all cases where it appears that the intention of the parties was to create a real tenancy at a real rent.

At p. 502:

It is, however, laid down in several cases lately decided by the English Court of Appeal, that, however binding these claims may be between the actual parties, it is open to third persons affected by their enforcement to impeach them in cases in which it may appear from the evidence that they were not intended to create a real tenancy, but were designed merely as a cloak for an additional security to the mortgagee.

And at p. 507:

It is to be observed of all these cases that they are instances in which the validity of the leasing clause was impunged by assignees in bankruptcy, and therefore the language is in some respects confined to the rights of such persons. I am of opinion, however, and the passages I have extracted from the judgments delivered in the Court of Appeal entirely bear me out, that it was not intended to restrict the principles laid down to cases in which the question was raised after a bankruptcy, but that these principles must be generally applied wherever the interest of third persons requires their application.

And at p. 508:

Therefore I regard the cases in which it has been considered open to assignees in bankruptcy in the interest of the general creditors to set up

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the colourable character of an attornment clause, as only instances of the application of a general rule which upon every ground of reason and law must also apply to other third parties whose rights ought only to be intercepted by a *bona-fide* landlord and especially to execution creditors of the mortgagor as well as to persons whose goods are sought to be taken by one who has no real but only a pretended and colourable right to the privilege which he assumes to exercise.

Mr. Justice Patterson says at p. 542:

The reality of the tenancy between the mortgagor and the defendant company depends in the first place on the sufficiency of the lease as a matter of conveyancing, and in the next place on the *bona-fides* of the transaction.

The latter point has usually been tested in England in the light of the bankruptcy law. Here we have no bankruptcy law at present, but it does not therefore follow that the intention with which the lease is made is to be disregarded. Creditors may be taken advantage of in other ways than those expressly forbidden by the bankruptcy laws, *and the right to challenge one of these leases is not confined to creditors.* Some of the ordinary incidents of the relation of landlord and tenant are fitted to produce injustice, and the person affected by them must have the right to question the reality of the relationship.

And at p. 550:

In this case the principal money secured by the mortgage is $20,000 and it bears seven per cent. interest. The payments are half yearly for five years from the 1st day of December, 1883, to the first day of June, 1888. Each six months down to the first day of December, 1887, five hundred dollars of principal and interest on the unpaid principal are payable, making the half yearly payments something over $2,000, the amount diminishing each half year by the amount of half a year's interest on five hundred dollars.

These are payments within the fair annual value of the property, and if the whole had been of the same amount no inference unfavourable to the reality of the transaction could have been drawn from the amount of rent reserved, but the remaining payment of $15,500 of principal with half a year's interest on that sum, making upward of $16,000, is considerably over four times the most extravagant estimate. It is impossible to hold that a lease on those terms was arranged with the honest purpose of creating a real tenancy. It is simply incredible.

In the appeal before me the attornment clause provides for a yearly rental equivalent to the annual interest secured thereby. This amounted to $3,000 for the first year and, in the absence of any evidence to the contrary, would seem to be a reasonable rental. But if $3,000 be a reasonable rental, $53,000 is beyond words unreasonable.

The only remaining question is as to whether the liquidator has a legal right to intervene in this matter and claim the bal-

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ance of the goods after Mr. Crossen's debt of $3,000 with interest and costs has been settled. Mr. Coyne argues that none but an execution creditor has any status. The liquidator is not a mere assignee of the company, he is appointed by the Court and is bound to protect the rights not only of the company and its members but also all classes of creditors of the company: See *In re Farmers' Loan and Savings Co.*, 2 O.W.R. 854.

The quotations I have given from the judgments of Strong and Patterson, JJ., in *Hobbs v. Ont. Loan and Debenture Co., supra,* show that the principles therein laid down must be generally applied wherever the interests of third persons require their application and that the right to challenge such an alleged lease is not confined to creditors.

An interesting argument was addressed to me by counsel for both parties on the question whether the license clause did or did not bring the case within the provisions of *The Bills of Sale and Chattel Mortgage Act,* R.S.M., 1913, ch. 17. But in view of the conclusion I have reached on the other branch of the case, it is unnecessary to deal with this argument.

For these reasons I hold that Mr. Crossen's distress warrant was good with respect to the interest due to him, amounting to $3,000, together with interest on $53,000, which became due under the unobjectionable acceleration clause, from January 11 to March 6; but that the distress was invalid in respect of the $50,000 principal.

If the entire distress were upheld Mr. Crossen would have to sell the goods in question with reasonable promptitude. I think the proper course now is to direct that the goods be all handed over to the liquidator, whose duty it will be to sell with reasonable dispatch, and to pay the amount due to Mr. Crossen as a first disposition of purchase-moneys.

The appeal having succeeded as to the principal, but failed as to the interest, there will be no costs of the appeal, except that the liquidator's costs be paid out of the assets of the company.

J. B. Coyne, K.C., and *A. L. Dysart,* for appellant, W. J. Crossen.

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H. J. Symington, K.C., for respondent, the liquidator.

PERDUE, C.J.M.—The question involved in this appeal arises in the winding-up of the above-named company under *The Winding-up Act,* R.S.C. 1906, ch. 144, and amendments, The Winnipeg Steel Granary and Culvert Company, Limited, (incorporated under the Manitoba *Companies Act,* R.S.M., 1913, ch. 35) on March 1, 1919, mortgaged its premises situated in St. Boniface, Manitoba, to William J. Crossen to secure a loan of $50,000, payable on January 11, 1924, with interest at six per cent per annum payable yearly on January 11. In April, 1919, the name of the company was changed by an order in council to "Crossen Metal Works, Limited." On January 11, 1920, an instalment of interest to the amount of $3,000 fell due and was not paid. On March 6 the mortgagee gave notice to the mortgagor that, because of default in payment of the interest, he declared the whole amount of principal due under the acceleration provision in the mortgage. Payment not being made the mortgagee distrained under the clauses in the mortgage for $53,000 and his bailiff took an inventory of the goods and chattels. A petition was filed to wind up the company under the Dominion *Winding-up Act* and a winding-up order was made. On April 27, 1920, the plaintiff turned over the goods distrained to the liquidator in compliance with an order made by the Master of the Court, which order provided that such delivery should be without prejudice to the rights, powers, etc. of the mortgagee. A case was stated upon an agreed statement of facts to ascertain the rights of the mortgagee. The Master made an order upholding the right of the mortgagee to distrain for the full amount of the principal and interest secured by the mortgage. On appeal Galt, J. confined the mortgagee's power of distress to the interest in arrear. From this last order the appeal is brought.

The statement of facts is fully set out by Galt, J. in the written reasons for his decision.

The mortgagee bases his right to distrain upon two clauses in the mortgage. They are as follows:

And for the purpose of better securing the punctual payment of the interest on the said principal sum, I, the mortgagor, do hereby attorn ten-

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ant to the mortgagee for the said lands, at a yearly rental equivalent to the annual interest secured hereby, to be paid yearly on each 11th day of January, the legal relation of Landlord and Tenant being hereby constituted between the Mortgagee and me, the Mortgagor.

And further that if I shall make default in payment of any part of the said principal or interest at any day or time hereinbefore limited for the payment thereof it shall and may be lawful for them, and I do hereby grant full power and license to the Mortgagee to enter, seize and distrain upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands as much of said principal and interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like case of distress for rent.

Under the first of the above clauses the legal relationship of landlord and tenant is actually created between the mortgagee and the mortgagor. The rent reserved is the same as the interest on the mortgage. It is fair and reasonable and is payable at stated times. The agreement therefore is valid. *Trust & Loan Co. v. Lawrason,* 6 O.A.R. 286, at pp. 295, 296, affirmed, 10 S.C.R. 679; *In re Stockton Iron Furnace Co.,* 10 Ch. D. 335, 48 L.J. Ch. 417.

The second of the above clauses does not attempt to create the relationship of landlord and tenant between the parties. That had already been done by the first clause. The second clause is inconsistent with the actual attornment clause and merely aims at conferring a license to distrain for a debt.

The second clause purports to give the mortgagee power to "enter, seize and distrain upon the said lands" and "to recover by way of rent reserved" as much of the principal and interest as shall be in arrear. This provision is quite inconsistent with the first clause. The first clause created a real tenancy. The second is merely a device to obtain for the mortgagee further security by enabling him to seize the chattels of the mortgagor. Assuming the legality of such a provision as between the mortgagee and the mortgagor, the strictest construction must be applied to an agreement so drastic and oppressive in its nature. The clause confers the right of distress only in case of "default in payment of any part of the said principal or interest *at any day or time hereinbefore limited for the payment thereof,*" and is limited to the amount of principal and interest "as shall from time to time be and

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remain in arrear and unpaid" at any day or time so mentioned. It does not, as I construe it, refer to principal the time for the payment of which has been accelerated by the act of the mortgagee under the option contained in the subsequent clause set out in the statement of facts. The acceleration clause forms no part of the license to distrain. If the mortgagee by his own act or declaration should accelerate the payment of principal he would be creating for himself a new right of distress different from that conferred by the clause.

In *Hobbs v. Ontario Loan and Debenture Co.*, 18 S.C.R. 483, a mortgage of real estate to secure $20,000 was payable with interest at seven per cent per annum, instalments of $500 each being paid each six months and $15,500 at the end of five years. It contained a provision that the mortgagees leased the lands to the mortgagor from the date of the mortgage until the last payment of the moneys secured, the mortgagor paying such rent or sum in each year as equalled in amount the amount payable on the days appointed in the proviso for redemption. The goods of the mortgagor having been seized under an execution the mortgagee claimed payment of a year's rent under the statute of Anne. An interpleader issue was directed. It was held by the majority of the Supreme Court that the relationship of landlord and tenant had not been created between the parties so as to give the mortgagee a right to distrain as against an execution creditor of the mortgagor. Strong, J., in giving judgment, said (pp. 492-493):

> It is well settled by authority that it is competent for the parties to a mortgage of real property to agree that in addition to their principal relation as mortgagor and mortgagee they shall also as regards the mortgaged lands stand towards each other in the relation of landlord and tenant, the mortgagor thus remaining in possession as the tenant of the mortgagee. It is, however, essential to the validity of such an arrangement that it should be so carried out as to comply with the requirements of the law prescribed for the creation of leases, and further that it should appear that it was really the intention of the parties to create a tenancy at the rental (if any) which may be reserved and not merely under colour and pretence of a lease to give the mortgagee additional security not incidental to his character of mortgagee.

The same eminent Judge said (p. 502):

> It is, however, laid down in several cases lately decided by the English Court of Appeal, that, however binding these claims may be between the

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actual parties, it is open to third persons affected by their enforcement to impeach them in cases in which it may appear from the evidence that they were not intended to create a real tenancy, but were designed merely as a cloak for an additional security to the mortgagee.

He cites *Ex parte Williams, In re Thompson,* 47 L.J. Bk. 26, 7 Ch. D. 138; *In re Stockton Iron Furnace Co., supra; Ex parte Jackson, In re Bowes,* 14 Ch. D. 726, 42 L.T. 272; *Ex parte Threlfall, In re Williamson,* 16 Ch. D. 274, 50 L.J. Ch. 318; *Ex parte Voisey, In re Knight,* 21 Ch. D. 442, 52 L.J. Ch. 121, as establishing the above principle. He expressed the opinion that the validity of a clause like the one in question may be attacked not only by assignees in bankruptcy but by other parties whose rights are affected by it.

It was strongly argued by Mr. Coyne that the liquidator is in no better position than the company itself to object to the action of the mortgagee. From the very meagre statement of facts agreed upon it appears that the mortgagor in this case is a trading corporation incorporated under *The Companies Act* of this province. I take it that the winding-up order was granted on the ground of insolvency. The machinery provided by the Act is therefore to be applied to the administration and winding-up of the estate of an insolvent corporation. It has been held that, "in its compulsory operation upon incorporated companies *The Winding-up Act* is an insolvency law:" *Shoolbred v. Clarke, In re Union Fire Insur. Co.,* 17 S.C.R. 265, at p. 274. I think this should be borne in mind in considering the provisions of the Act.

In *In Re Canadian Shipbuilding Co.,* 26 O.L.R. 564, it was held by Riddell, J., that a liquidator of a company, not being a creditor or a purchaser for valuable consideration, could not take advantage of the provisions of *The Bills of Sale and Chattel Mortgage Act,* R.S.O., 1897, ch. 148. That case was followed in Alberta by the Appellate Division in the case of *Security Trust Company, Ltd. v. Stewart,* 12 Alta. L.R. 420, [1918] 1 W.W.R. 419 (Harvey, C.J. dissenting), the Court holding that a liquidator has not the right, on behalf of the creditors of the company, to attack a chattel mortgage made by the company on the ground of statutory defects. In the decision of these cases much turned upon the meaning of the

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word "creditors" in *The Bills of Sale and Chattel Mortgage Act*. The meaning to be given to the word "creditors" as used in that Act has been greatly extended by the recent judgment of the Supreme Court of Canada in *Grand Trunk Pac. Ry. Co. v. Dearborn*, 58 S.C.R. 315, [1919] 1 W.W.R. 1005. It is there held that the word "creditors" as used in the Act means all creditors of the mortgagor and not merely execution creditors, over-ruling *Parkes v. St. George*, 10 O.A.R. 496, and other cases following that decision.

The same question was considered by Street, J., giving the judgment of the Divisional Court in *In re Canadian Camera & Optical Company*, 2 O.L.R. 677. He said:

> It is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, viz., that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights, because their right to prosecute actions themselves against the company and to recover their claims directly out of the property of the company is taken away by *The Winding-up Act*.

This case was followed by Teetzel, J., in *National Trust Co. v. Trusts and Guarantee Co.*, 26 O.L.R. 279, a case decided two months prior to the decision in *In re Canadian Shipbuilding Co., supra*, but not referred to in the latter. In giving judgment Teetzel, J. said, at p. 288 (26 O.L.R.):

> The question of the right of the defendant as liquidator to contest the plaintiff's claim under the mortgage, and to hold the proceeds of the chattel property for the benefit of the creditors, has given me much trouble; but I have arrived at the conclusion that the defendant has that right * * * * .
>
> Under sec. 33 of *The Winding-up Act*, the liquidator, upon his appointment, "shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled." Having done this, further general duties are, as stated in Palmer's Company Law, 9th ed., p. 395, "to make out the requisite lists of contributories and of creditors, to have disputed cases adjudicated upon, to realize the assets, and to apply the proceeds in payment of the company's debts and liabilities, in due course of administration, and, having done that, to divide any surplus amongst the contributories, and to adjust their rights."

The same learned Judge cited with approval the paragraph above quoted from the judgment in *In re Canadian Camera & Optical Company, supra*, and went on to say:

> Being therefore from the beginning, *prima facie* lawfully in possession of the property in question, as an officer of the court, and being charged

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with the duty of applying the proceeds in payment of the company's creditors in due course of administration, I hold that the defendant is entitled, in right of the creditors represented by it as liquidator, to contest in this action the validity of the plaintiff's mortgage.

Under sec. 34 of the Act the liquidator may, with the approval of the Court,

(a) bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liquidator or in the name of the company, as the case may be.

Riddell, J. in *In re Canadian Shipbuilding Co., supra,* placed reliance upon a dictum made use of by Lord Cairns in *In re Duckworth, Ex parte Cooper,* L.R. 2 Ch. 578, 36 L.J. Bk. 28, which he cites as follows:

The liquidator represents the creditors * * * but only because he represents the company.

The actual words used by Lord Cairns are stated in the report as follows, at p. 580 (L.R. 2 Ch.):

I do not forget Mr. Bagley's observation that the liquidator represents the creditors. No doubt he does, but only because he represents the company, and through the company the rights of the creditors are to be enforced.

The *Duckworth Case* was one of set-off between the liquidator of a limited company and the trustees of a bankrupt contributory. It was held that, under the bankruptcy enactments which governed the case, set-off applied. The dictum does not appear to me to be of importance in the consideration of the present case. *In re Duckworth, supra,* and *Waterhouse v. Jamieson,* L.R. 2 H.L. (Sc.) 29, at p. 38, where it was referred to, were both cases arising between the liquidator and a contributory. It was not a case of a third party setting up a claim to assets of the insolvent company under an agreement which operated as a preference over other creditors, if not as a fraud upon them.

In *Kent v. La Communauté des Soeurs de Charité de la Providence* [1903] A.C. 220, at p. 226, 72 L.J.P.C. 61, Lord Davey dealing with a case under the Canadian *Winding-up Act* said:

The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the company, and on the other hand he is the representative for some purposes of the creditors and contributories. There are therefore many cases in which he may sue in his own name,

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as, e.g., to impeach some act or deed of the company before the winding-up which is made voidable in the interest of the creditors and contributories.

The device by which the mortgagee in the present case was given a power to distrain on default in payment of the interest, not only for the interest, but for the whole amount of principal, might, under the authority of the *Hobbs Case, supra,* have been successfully attacked by creditors of the company on obtaining judgment and execution. It could also have been set aside by an assignee for the benefit of creditors, or, perhaps, in an action brought on behalf of all the creditors. The extended meaning to be given to the word "creditors" under *G.T.R. v. Dearborn, supra,* gives support to the suggestion last expressed. But the winding-up proceedings tied the hands of the creditors in taking any action against the company. The right to bring an action or legal proceeding passed to the liquidator (sec. 34 [*a*]). It was his duty to take into his custody or control all the property, effects and choses in action to which the company was or appears to be entitled (sec. 33). If he found, as he did find, the mortgagee in possession of the company's property under the pretended right given by the clause in question, it was the duty of the liquidator to take steps to recover that property for the purposes of the winding-up. In my opinion the Act enabled him to do so.

I have already pointed out that on a strict construction of the second clause set out in the statement of facts, the distress for the whole principal sum of $50,000 was unauthorized, because the time for payment of the principal fixed in the earlier portion of the mortgage had not arrived and the acceleration clause formed no part of the contract giving the power of distress. If this view is correct the company itself could object to the distress, and there could then be no question as to the right of the liquidator to contest the rights of the mortgagee.

There remains the question whether the license or power to distrain for principal and interest comes within the provisions of *The Bills of Sale and Chattel Mortgage Act.*

In *Stevenson v. Rice,* 24 U.C.C.P. 245, Hagarty, C.J. said:

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A covenant for a right to take possession of chattels on a prescribed default or contingency, etc., may be defeated as against creditors, if *The Bills of Sale Act* be not complied with.

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I cannot find any later authority upon the question. In England a license to distrain is brought within the operation of *The Bills of Sale Act* by special enactment: See 41 & 42 Vict., ch. 31. But it must be noted that the form of the English *Bills of Sale Act* differs from that of ours. The English Act has a clause declaring what a bill of sale includes. It is under that clause that the Act is made to apply to a license to distrain. In this province we have no similar provision but a wide interpretation must be given to the words in sec. 5 of our Act, R.S.M., 1913, ch. 17: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels." Sec. 7 of the Act declares that a covenant, promise or agreement to make, execute or give a mortgage or conveyance intended to operate as a mortgage of goods and chattels, "in whatever words the same may be expressed, shall be deemed to be a mortgage or conveyance within the meaning of this Act." This shows that the intention of the parties is the element that governs in deciding whether the instrument is a mortgage or not: See *Barron & O'Brien, Chattel Mortgages and Bills of Sale,* 2nd ed., pp. 7-9.

The clause in question in this case says in effect:

If the mortgagor makes default in payment of principal or interest at any of the dates appointed for payment, the mortgagee may enter on the land before described and seize all distrainable goods found there and sell them and apply the money on the debt, the mortgagee in so doing to follow the proceedings of a landlord distraining for rent.

The intention of this agreement was, without doubt, to extend the security of the mortgage to the goods of the company on the mortgaged lands. It appears to me that this is a conveyance intended to operate as a mortgage of chattels or an agreement to give the equivalent of such a security, and that it comes within the provisions of *The Bills of Sale and Chattel Mortgage Act.*

I would dismiss the appeal with costs.

CAMERON, J.A. concurs with Fullerton, J.A.

FULLERTON, J.A.—This appeal raises a difficult and at the same time a very important question for the opinion of the

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Court. The appellant Crossen loaned the respondent $50,000 on the security of a mortgage. The mortgage contained an acceleration clause. It also contained the following clauses: [See *ante*, p. 510.]

Default having been made in the payment of interest the appellant declared the whole amount of principal and interest due and distrained the goods and chattels of the respondent on the premises for the full amount of principal and interest.

No dispute arises with regard to the first clause. It is conceded by both parties that it creates a valid tenancy at a yearly rental of $3,000.

The difficulty arises regarding the second clause.

Counsel for the respondent argues that both clauses must be read together and so reading them the result is an attempt to reserve a rental far in excess of the value of the property and thus the case is brought within that line of cases which hold that where the rent reserved is unreasonable, the validity of the lease may be attacked by third parties interested.

My view is that the first clause is complete in every particular. In so many words it constitutes the relation of landlord and tenant between the mortgagee and the mortgagor, and fixes the amount of the yearly rental.

The second clause does not purport to create the relation of landlord and tenant between the parties. It grants to the mortgagee in the event of default

> full power and license * * to enter, seize and distrain upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved *as in the case of a demise of said lands* so much of said principal and interest as shall from time to time be or remain in arrear and unpaid together with all costs, charges and expenses attending such levy or distress *as in like case of distress for rent.*

The words "as in the case of a demise of said lands" and "as in like case of distress for rent" show clearly that the clause was not intended to create the relation of landlord and tenant which had in fact been created by the previous clause. This clause gives a collateral license to distrain for arrears of interest and principal apart entirely from the existence of any tenancy.

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The words of the clause show clearly that the distress is not to be for rent but for principal and interest to be recovered in the same way as rent.

It is said that this clause is unconscionable and should not be given effect to. It, however, is part of the contract between the parties and cannot be disregarded. The appellant was making a large advance to the respondent and was entitled to secure himself by any legal provision in the contract however stringent.

Respondent raised the further contention that the instrument in question here is a bill of sale within the definition in *The Bills of Sale and Chattel Mortgage Act*, ch. 17, R.S.M., 1913.

Sec. 7 of that Act is as follows:

7. Every covenant, promise or agreement entered into to make, execute or give a mortgage or conveyance intended to operate as a mortgage of goods and chattels, in whatever words the same may be expressed, shall be deemed to be a mortgage or conveyance within the meaning of this Act, and, unless accompanied by an immediate delivery and an actual and continual change of possession of the goods and chattels mortgaged, shall be registered within the time and in the manner prescribed in the next preceding section, together with affidavits of *bona fides* and execution otherwise such covenant, promise or agreement shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for good or valuable consideration.

I do not think that the clause in question falls within the meaning of the above-quoted section. It is not a covenant either to make, execute or give a mortgage or conveyance. As I have already pointed out it is merely a license, on the happening of certain events, to enter and distrain.

A further question was discussed on the argument as to the right of the liquidator to take advantage of a defect in the mortgage. In the view that I take of the disputed clause it is unnecessary to discuss the point.

I would allow the appeal with costs and restore the order of the Master.

DENNISTOUN, J.A. concurs with Perdue, C.J.M.

Appeal dismissed upon an equal division of the Court.

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COURT OF APPEAL

HINCHCLIFFE v. BAIRD & BOTTERELL

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

Agency—Bailment—Trusts and Trustees—Grain—Employment of Sub-Agent — Liability to Account — Grain Elevator Operator Selling in Breach of Trust—Selling Through Agents—Transactions in "Futures" Through Agents—Application by Agents of Proceeds of Sale of Grain to Meet Operator's Losses in "Futures" Transactions—Operator Claiming Recovery as "Trustee" for Farmers — Good Faith of Agents — Criminal Code S. 231.

If an agent for sale of grain to whom the goods are consigned or delivered, consigns the same to a sub-agent for sale and the bill of lading and such other documents and circumstances as there are support the inference of the agent's right to deal with the goods, then in the absence of anything showing a contrary intention the sub-agent has only to account in respect of the proceeds to the first agent and not to the original principal.

Plaintiff operated a grain elevator and consigned shipments of grain for sale to agents at Regina who sold through their agents at Winnipeg. Plaintiff also dealt in "futures" through his Regina agents who from time to time as margins were required transferred moneys from his cash grain account to his "futures" account, in which plaintiff acquiesced. Through losses in his dealings in futures plaintiff was unable to pay his farmer customers and brought action against said Regina and Winnipeg agents, claiming amongst other things the recovery on behalf of such farmer customers of the moneys so transferred. Some of the grain had been sold by plaintiff without the authority of the farmers who had stored it with him.

Held plaintiff could not recover; as to the Winnipeg agents they were justified in remitting the proceeds to the Regina agents from whom their instructions came, there was no privity of contract between them and the plaintiff or between them and the farmers; neither of the defendants had notice of any breach of trust by plaintiff in selling the grain, the bills of lading and endorsements thereon were regular and there was nothing in connection therewith to arouse suspicion; defendants had in good faith paid for the grain, and the set-off of sums due by plaintiff to the Regina agents had been made and agreed to before any claim on behalf of the farmers was made.

A plaintiff claiming as trustee to be entitled to recover moneys must be treated in all respects as a party to the cause, and any defence against him personally is a defence in that action against him as trustee (per Fullerton, J.A.).

A bailee is not a trustee in the sense that he can sue for a breach of trust committed by himself (per Fullerton, J.A.).

As to a claim by plaintiff that the transactions in futures were in contravention of *The Criminal Code*, it was held that plaintiff could not recover the amount of the margins paid, as the parties were equally in

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fault and *in pari delicto potior est conditio possidentis* (per Perdue, C.J.M.). 1920

Other claims for breaches of duty by defendants were dismissed on the evidence; also, apart from the legal questions involved, plaintiff's status as trustee in the suit or his claims as such were held not supported by sufficient evidence.

ARGUED: 5th July, 1920.
DECIDED: 5th August, 1920.

APPEAL from a judgment in favour of the defendants in an action to recover a sum of money and for damages for conversion of grain and for loss of business and reputation. Appeal dismissed with costs. Statement.

J. B. Coyne, K.C., D. Forrester and *A. T. Hawley,* for plaintiff, appellant.

W. A. T. Sweatman and *W. P. Fillmore,* for defendants, respondents.

PERDUE, C.J.M.—During the period in which the matters in question in this action arose the plaintiff owned and operated a grain elevator at Strassburg, Saskatchewan. The defendants Baird & Botterell are a firm of grain dealers and brokers in the city of Winnipeg and the Regina Grain Company, Limited, is a corporation carrying on a similar business at Regina. During the fall of the year 1915 the plaintiff handled some 200,000 bushels of grain grown by farmers in the vicinity of Strassburg. He alleges that it was agreed between him and the defendant company that the company would act as the agent of the plaintiff in handling all cash grain forwarded by the plaintiff for his customers whether obtained on track or through the plaintiff's elevator at Strassburg. It was also agreed, as plaintiff alleges, that Baird & Botterell should act only as the agents of the defendant company in offering for sale grain forwarded by the plaintiff for his customers and that the plaintiff sent bills of lading of the grain to the company with instructions to obtain the best current price obtainable on the Winnipeg grain market.

The plaintiff claims that by reason of press of work he did not keep a proper record of each transaction but relied on the defendant company to do so. He complains that Baird & Botterell (whom I shall call "the firm") and the defendant

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company were one and the same concern, that the firm "wrongfully and contrary to law" assumed to act as purchasers of the grain, that the price was not the best procurable and that the plaintiff thereby suffered loss and damage. He charges that the defendants thereby secretly and corruptly received for themselves large profits, and have not accounted for them; that the firm and the company entered into a conspiracy to wrongfully and unlawfully obtain undue advantage of the plaintiff and his customers; and, in the alternative, that the firm wrongfully converted the grain to its own use. But the main complaint of the plaintiff is that the defendant company transferred the sum of $19,745.30 from the plaintiff's cash grain account "to a pretended account," which the company kept under the plaintiff's name for customers in the Strassburg district in their trading in futures in grain, stocks or other commodities. He claims that this was done wrongfully and without authority.

In the alternative the plaintiff claims that the transactions last above mentioned in which he was charged with the above sum were gambling transactions or were contracts or agreements made by defendants with intent to make a gain or profit by the rise or fall in price of grain sold or purchased in respect of which no delivery of the thing sold or purchased was made or received and there was not any *bona-fide* intention to make or receive such delivery, that the same were void or were made in contravention of sec. 231 of *The Criminal Code*. Plaintiff complains that by reason of the alleged improper actions of the defendants he was unable to pay the farmers for their grain and he was compelled to discontinue his elevator business, that he was damaged in his reputation and suffered great financial loss. The concluding allegation is that in respect of the complaints made, in which the plaintiff is beneficially interested, he sues in his personal capacity, and in respect to the moneys due to the sundry farmers, *the plaintiff sues on behalf of and as trustee for said sundry farmers.*

In the prayer the plaintiff claims the above sum of $19,745.30, an accounting of the grain received and profits made, interest, damages for conversion of the grain, loss sus-

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tained by plaintiff and said sundry farmers by reason of the alleged fraudulent and improper conduct of the defendants, and damages for the plaintiff's loss of business and reputation.

The plaintiff did some track-buying and he also had grain of his own. His elevator contained 13 bins and appears to have had a capacity of about 45,000 bushels. He states that the greater part of the grain received was specially binned and storage tickets therefor would be issued to the farmers storing it. See *The Canada Grain Act*, ch. 27 of 1912 (Dom.) sec. 157 (*e*). He states that he handled 200,000 bushels through his elevator in a little over two months. There would therefore be over 100,000 bushels of grain specially binned in an elevator of less than half that capacity. According to his own story he accomplished this feat in the following manner. As fast as he could procure cars he shipped the grain forward, whether it was specially binned or not. He got the farmers to sign orders for cars and turn them over to him. According to his own statement, if he could get cars he could specially bin 50,000 bushels in two days. He simply shipped out the specially binned grain without orders, sold it, received the money and made room for more specially binned grain. He signed the great majority of the bills of lading in his own name as shipper. This enabled him to consign the grain to his own agents and to receive the proceeds. Of the bills of lading put in evidence 91 were signed by the plaintiff as shipper, 44 were signed by farmers and 16 by the plaintiff as agent for the shipper. The grain was consigned in the great majority of the transactions to the defendants the Regina Grain Company. Even where farmers signed bills of lading as shippers they usually endorsed them to the plaintiff. He got farmers to endorse shipping bills in blank which he could fill up as he pleased. The farmers who had instructed the plaintiff to sell generally received from him an advance of part of the price, but much of the grain belonging to farmers which was stored and specially binned was sold without their authority and the proceeds were received by the plaintiff.

According to the plaintiff's story, in order to protect himself against claims by farmers whose grain he had shipped out and sold without authority, he bought May wheat through the

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Regina Grain Company. This would be a protection to the farmers and himself should there be a rise in price. The company had a private wire to Strassburg and the plaintiff could constantly obtain information as to the market fluctuations. He arranged with the company to take orders for dealing in futures in the grain market. On these transactions he was to collect from customers at Strassburg five cents a bushel as margins. A certain amount of speculation appears to have been done. The plaintiff collected considerable sums from the parties investing. In other cases he charged against the proceeds of grain in his hands held on behalf of farmers sums expended in the purchase of options, or said to have been so used. Some of these charges were improperly made. In one case $510 was charged to the account of a man who lived 30 miles from Strassburg, was not speculating and had no option account. The truth of the matter was, as I gather it from the evidence, that the plaintiff himself speculated heavily in the wheat market and with disastrous consequences to himself and to the farmers whose grain was in his hands.

The Regina Grain Company received the wheat consigned to it by the plaintiff or for his account, sold it through their agents, Baird & Botterell, and placed the proceeds to his credit in his cash grain account in their books. In respect of all the dealings in futures engaged in by the plaintiff either for himself personally or for customers at Strassburg who had put up their margins with him, he sent to the Regina Grain Company only $100 to secure them in these transactions. The company therefore transferred from his cash grain account to his option account, sums of money from time to time to make good the losses he had sustained. I have no doubt that this was done with his knowledge and consent. He was constantly in communication with the company, received from them statements showing how his accounts stood from time to time and personally saw their manager on several occasions at Strassburg and at Regina while these speculations were going on. He certainly received notice of the first transfer as early as September 22, 1915, by the company's letter of that date. Although he knew the transfers were being made

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he took no objection, but on the contrary acquiesced in the practice.

The consequences of the plaintiff's reckless and fraudulent dealings with his customers' property culminated at the end of December. Farmers who had stored grain were demanding it. The plaintiff hurriedly left Strassburg. The farmers broke open the elevator and found it empty.

This plaintiff is now suing on behalf of himself and of the farmers whom he defrauded to recover from the defendants, if possible, the amount of his defalcations. The only evidence we have that he received any authority from his former customers to bring this suit is his own unsupported evidence. I think the trial Judge was fully justified in declining to take this as sufficient. After a careful reading of the plaintiff's evidence I find it full of contradictions, of glaring improbabilities and allegations shown to be untrue. I think it is most likely that the plaintiff, without authority from those whose cause he pretends to champion, brought this suit in the hope of diverting from himself a scrutiny which might possibly lead to legal proceedings, not necessarily of a civil nature. But even if the injured farmers have acquiesced in the bringing of this suit by the plaintiff, not one of them came forward and proved any claim, or the nature of it, or the loss sustained. The plaintiff himself does not know what became of the wheat of any particular customer. A car ordered from the railway company by a farmer was used to ship out any wheat that might be in the elevator. Some of the farmers who instructed the plaintiff to sell were paid or partly paid. Others who had stored their grain lost it.

In regard to the defendants Baird & Botterell there was no privity between them and the plaintiff or between them and the farmers who supplied the grain. The firm received the cars of grain in the ordinary course of their business as grain brokers, sold them by the instructions of the consignees and remitted to the latter the proceeds, less ordinary charges. There is not the slightest suggestion of any irregularity or negligence. It is admitted that the bills of lading and the endorsements upon them are regular and that there is nothing

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upon the documents themselves to arouse suspicion in any person dealing with them.

Mr. Coyne argues that under *The Canada Grain Act*, ch. 27 of 1912, the plaintiff was a bailee of the specially binned grain, that *Lawlor v. Nicol*, 12 Man.R. 224, and the case it follows, *S. Australian Insurance Co. v. Randall*, 6 Moore P.C. (N.S.) 341, L.R. 3 P.C. 101, no longer apply. He argues that a bailee is a trustee and that the specially binned grain as trust property may be followed into the hands of persons subsequently dealing with it. He cited *Beal on Bailments*, 45-47; *Carson v. Sloane* (1884) 13 L.R.Ir. 139; *Price v. Blakemore*, 6 Beav. 507; *Burdick v. Garrick*, L.R. 5 Ch. 233, 39 L.J. Ch. 369; *Reid-Newfoundland Co. v. Anglo-American Tel. Co.* [1912] A.C. 555, 81 L.J.P.C. 224; *Roblin v. Jackson*, 13 Man. R. 328; *Ex parte Cooke, In re Strachan*, 4 Ch. D. 123, 46 L.J. Bk. 52, and other cases. I cannot find in any of the decisions cited authority for the proposition that the purchaser of a commodity such as grain who has bought it for value in good faith, in the ordinary course of business, and unaware of any breach of trust connected with it, may, if the vendor is shown to have committed a breach of trust, be called upon to restore the property or again pay the value of it. Some of them show the very opposite.

Maspons v. Mildred, 9 Q.B.D. 530, 51 L.J. Q.B. 604, affirmed in the House of Lords, 8 App. Cas. 874, 53 L.J. Q.B. 33, was much relied upon by plaintiff's counsel. In that case an English firm traded with D., a Spanish shipping agent at Havannah. The plaintiffs, who were Spanish merchants at Havannah, consigned a cargo of goods to the defendants through the agency of D. The defendants knew that D. was acting for a third party whose name was not disclosed. Defendants in London insured the ship in the name of themselves and for the benefit of all parties interested. The ship having been lost the policy money was paid to the defendants, and D. being insolvent, the plaintiffs claimed the whole money after deducting premiums and expenses. It was held by the Court of Appeal: (1) That the questions must be determined under English law; (2) That the insurance was for the benefit of the plaintiffs, subject to the lien of the de-

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fendants and D. in respect of the cargo consigned to defendants; (3) That there was privity of contract between the plaintiffs and defendant and that plaintiffs had a right of action against defendants for the balance of the policy moneys; (4) That defendants had no lien on the money, or right of set-off, for the balance of general account due from D. The case turned on the fact that the defendants knew that D. was an agent for a principal, although the name of the principal was not disclosed. In the House of Lords the decision was affirmed. There, Lord Selbourne, L.C. put the gist of the case in these words at p. 888, (8 App. Cas.):

> The fact that the appellants [defendants] had notice of the respondents' interest, before they had done anything for valuable consideration on the footing and faith of the property in this insurance belonging to Demestre Chia & Co. [the agent] so that their general lien against that firm could attach upon it, is enough, in my opinion, to decide this case.

There was no evidence in the present case showing that either of the defendants was aware that Hinchcliffe was committing a breach of trust in connection with any of the shipments of grain made by him. He had grain of his own to sell and he also purchased grain as a track buyer. In all cases he had apparent authority to sell. It would be impossible to carry on the grain trade if each purchaser of a bill of lading were required to go behind it and ascertain whether the shipper had a right to sell and whether he was principal or merely agent. But the main difference between the present case and the cases relied upon by the plaintiff's counsel is this: Each of the defendants had paid in good faith for every carload of grain received, before any claim was made by the farmers who had delivered grain to the plaintiff. Also, the set-off of sums due by him to the Regina Grain Company had been made and agreed to, before any other parties laid claim to the moneys in the company's hands. Even if some of the transactions in futures made through the defendant company were in contravention of sec. 231 of *The Criminal Code* the parties were equally in fault and *in pari delicto potior est conditio possidentis* and the plaintiff's claim for the return of the margins paid must fail: *Taylor v. Chester,* L.R. 4 Q.B. 309, 10 B. & S. 237, 38 L.J. Q.B. 225; *Harse v. Pearl Life Assur. Co.* [1904] 1 K.B. 558, 73 L.J. K.B. 373.

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The principle to be applied in a case like the present is stated in *New Zealand Land Co. v. Watson*, 7 Q.B.D. 374, 50 L.J. Q.B. 433. The plaintiffs in that case shipped wheat to England taking bills of lading deliverable to themselves in London and endorsing these bills of lading to factors at Glasgow with instructions to sell the wheat in London. The factors were in the habit of endorsing the bills of lading to the defendants in London for the purpose of selling the wheat. The endorsement of bills of lading by the plaintiffs to their factor was in each case for the purpose of selling the wheat and not with the intention of passing the property. The plaintiffs knew that the sales made in London were made by brokers employed by the Glasgow factors but were in no way parties to the particular contracts of sale nor were their names disclosed upon them. The Glasgow brokers also carried on a business at Leith and employed the defendants in respect of this business also, and when they stopped payment they were indebted to the defendants upon the Leith account but not on the Glasgow account. The plaintiffs sued the defendants for the net balance of cargoes of wheat after deducting the remittances made by the Glasgow brokers in respect thereof, but without giving credit due to them from the Glasgow firm on other transactions. The jury found that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the wheat, and also, that defendants knew, or had reason to believe, that the Glasgow firm were acting in the sales as agents for a third person. It was held in the Court of Appeal that the plaintiffs were not entitled to recover, as there was no privity of contract between them and the defendants and the defendants did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendants' hands, and that whatever right the plaintiffs might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds, without giving credit for the sum due to the defendants from the Glasgow firm on their general account.

It appears to me that this case affords sufficient authority for dismissing the plaintiff's action. It is directly in point

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and has not, so far as I can find, been qualified or even questioned in any subsequent decision. In regard to the proposed application of the doctrine of trusts to the bailment of the grain and the subsequent transactions, I would cite a passage from the judgment of Bramwell, L.J. in the same case. He says at pp. 381-2 (7 Q.B.D.):

> Then another point in the judgment is that the second finding of the jury (which I think was a perfectly correct one) namely that the defendants knew, or had reason to believe, that Matthews & Thielman (the Glasgow factors) were acting as agents, was in the opinion of Mr. Justice Field rightly relied on by the counsel for the plaintiffs, as conclusively entitling the plaintiffs to judgment in respect of their rights as owners of the cargoes to follow the proceeds of their property in the hands of the defendants in their fiduciary character of agents and trustees. Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial case turned into a trustee with all the troubles that attend that relation. I think there is no ground for holding that these defendants have any fiduciary character towards the plaintiffs. They are subagents of Matthews & Thielman, and there is nothing in the nature of a trust that I can see in the case.

I think the trial Judge was right in dismissing the action. I would dismiss the appeal with costs.

CAMERON, J.A. concurs in dismissing the appeal.

FULLERTON, J.A.—During the grain season of 1915 the plaintiff operated a grain elevator at Strassburg, Saskatchewan. The grain received into the elevator was shipped out from time to time and consigned to the defendant company, who sold it through the defendants Baird & Botterell, who were brokers carrying on business at Winnipeg. During the season grain of the value of $153,242.21 was so shipped. The defendant company paid the plaintiff $133,496.91 in cash and the balance of $19,745.30 by crediting amounts due the defendant company in connection with transactions in grain futures carried on by the plaintiff through the defendant company during the season of 1915. In June, 1917, the plaintiff, claiming that certain farmers whose wheat had been consigned to the defendant company had not been paid, launched this action.

The statement of claim alleges that the defendants Baird & Botterell did not sell the various consignments of grain on

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the Winnipeg grain market but purchased it themselves, paying less than could have been procured on the Winnipeg grain market "and thereby secretly and corruptly received for themselves large profits." I may say here that there is not a line of evidence in the case to support the above allegation.

Pars. 21, 22 and 23 in substance allege that defendants did not pay for said grain on the basis of their pretended sales but transferred the sum of $19,745.30 from the plaintiff's cash grain account to the "futures" account, that the plaintiff never authorized the defendants to trade in "futures" and that such trades were gambling transactions and illegal.

Par. 24 alleges that by reason of the improper actions of the defendants the plaintiff was unable to pay the sundry farmers and that there are still large amounts due to said farmers.

Par. 24 reads as follows:

> In respect of the complaints herein, in which the plaintiff is beneficially interested, the plaintiff sues in his personal capacity *and in respect of the monies due to the said sundry farmers, the plaintiff sues on behalf of and as trustee for said sundry farmers.*

The relief claimed is to recover the sum of $19,745.30, an account, etc.

The learned trial Judge has found, and his finding is fully supported by the evidence, that the plaintiff ratified the transfer of the sum of $19,745.30 from the plaintiff's cash grain account to the "futures" account.

This finding is a complete answer to any claim of the plaintiff in his personal capacity.

There remains only to consider what, if any, rights he has to recover in this action as trustee for and on behalf of the unpaid farmers.

At the conclusion of the plaintiff's case, counsel on behalf of the defendants Baird & Botterell moved for a nonsuit which the learned trial Judge granted.

His decision was placed on two grounds: (1) That as between the plaintiff and the defendants Baird & Botterell there was no privity of contract; (2) That even if there was

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privity of contract the plaintiff had failed to make out any case.

I think the trial Judge was clearly right. It is not alleged in the statement of claim that the defendants Baird & Botterell were the agents of the plaintiff. The evidence shows that the defendant The Regina Grain Company employed Baird & Botterell as its agents to dispose of the grain. As between plaintiff and The Regina Grain Company the latter was under no obligation to employ Baird & Botterell. The Regina Grain Company could as well have employed any other broker.

In 2 *Smith's Leading Cases,* at p. 368, the law is stated as follows:

> A distinction must further be noted between the case where an agent makes a contract on behalf of his unknown principal and so establishes privity between his principal and the other party, and the case where the so-called agent having a contract with his principal effects a sub-contract with a third party to carry out his own. In the latter case no privity of contract is created between the principal and the third party. See *New Zealand and Australian Land Co. v. Ruston,* 5 Q.B.D. 474, reversed 7 Q.B.D. 374, 50 L.J.Q.B. 433; *Maspons v. Mildred,* 9 Q.B.D. 530, 51 L.J.Q.B. 604; 8 App. Cas. 874, 53 L.J.Q.B. 33; *Ireland v. Livingstone,* L.R. 5 H.L. 395, at p. 408, 41 L.J.Q.B. 201, per Blackburn, J.

In 1 *Halsbury,* at p. 171, the rule is stated thus:

> There is as a general rule no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer the agent. The exception is where the principal was a party to the appointment of the sub-agent, or has subsequently adopted his acts, and it was the intention of the parties that privity of contract should be established between them.

After evidence had been given on behalf of the defendant company the trial Judge dismissed the action as against it.

He held that the plaintiff was not a trustee for his customers and therefore could not maintain the action.

While a bailee may in a sense be said to be a trustee I do not think he is a trustee in the sense that he can sue for a breach of trust committed by himself. The evidence of the plaintiff is most unsatisfactory and unreliable and so full of contradictions and absurdities that it would be impossible in any event to rely on it as a basis for a judgment. If we give it any credence at all it shows that bills of lading for the

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several cars of grain were either drawn in his own name or in the name of the farmer and endorsed by the latter to the plaintiff, that in the case of each car a draft was drawn by the plaintiff on the defendant company for from 75 to 80 per cent of the value of the car, that the bill of lading endorsed by the plaintiff was then attached to the draft, and that when the car was sold and the adjustments made the balance due on the car was sent to the plaintiff.

It also would appear from the plaintiff's evidence that a considerable quantity of grain was shipped out without the authority of the owners. The whole difficulty arises from the fact that the plaintiff instead of paying the proceeds of the grain to the several owners, was from time to time using the money to finance his speculations in "futures" which were unsuccessful and resulted in the loss of the amount claimed in this action.

He dealt in "futures" through the defendant company, who from time to time, as margins were required, transferred moneys from his cash grain account to his "futures account."

As against the plaintiff personally, as has already been pointed out, the findings of the trial Judge that he had ratified the transfers from his cash grain account to his "futures" account is conclusive. Can he then maintain this action as a trustee?

Gibson v. Winter, 5 B. & Ad. 96, 2 N. & M. 737, appears to be directly in point. The headnote to that case reads as follows:

> A trustee suing as a plaintiff in a Court of Law, must be treated in all respects as a party to the cause, and any defence against him is a defence in that action against the *cestui que trust,* who uses his name; and therefore, where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held, that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants; and therefore an answer to the action.

While the case is that of a trustee suing in a Court of law and the present case is that of a plaintiff suing in a Court

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which administers both law and equity, I cannot draw any distinction as to the principle which should be applied.

If the plaintiff were to fail here on the merits the cause of action would not be *res judicata* as against the persons he claims to represent and they would be at liberty to put the defendants to the expense of fighting the matter all over again.

This consideration alone is sufficient to show that the plaintiff cannot maintain the action as a trustee.

Moreover we have nothing but the plaintiff's word for his authority to represent the parties he claims to represent.

Apart from the inability of the plaintiff to maintain the action against the defendant company as a trustee and assuming that the evidence of the plaintiff could be believed, which is by no means the case, in my view the evidence given on behalf of the plaintiff falls far short of what is necessary to justify a verdict in his favour.

None of the farmers whom the plaintiff claims are unpaid were called at the trial, nor does the evidence show even their names or the amount of their respective claims. The only evidence is that of the plaintiff himself, who says that, "somewhere around $10,000 or $12,000 is due the farmers."

We are left entirely in the dark as to the names of the farmers, the amount of grain shipped by each, the amount paid on account of each car, the balance due—in fact we have nothing whatever to go on save the general indefinite statement of the plaintiff above quoted.

In my view such evidence is entirely too vague and indefinite to justify a Court in giving a judgment for the plaintiff.

I would dismiss the appeal with costs.

DENNISTOUN, J.A. concurs in dismissing the appeal.

Appeal dismissed with costs.

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COURT OF APPEAL

McCOLL v. CANADIAN PACIFIC RAILWAY COMPANY

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

Injunction—Restraining Application to Workmen's Compensation Board —Threatened Injury Not Sufficient to Justify Injunction.

Plaintiff brought an action for damages for the death of her husband on defendant's railway, claiming such death was the result of defendant's negligence and breach of statutory obligations. Defendants gave notice of application to the Workmen's Compensation Board under sec. 13 (2) of *The Workmen's Compensation Act* for adjudication and determination of the question of the plaintiff's right to compensation under that Act and as to whether the action was one the right to bring which is taken away by that Act, and plaintiff then obtained an injunction ([1920] 2 W.W.R. 24) restraining such application on the ground that that Act does not restrict the right to recover damages under sec. 385 of *The Railway Act, 1919,* (Dom.). Appeal from said injunction was allowed on the ground that it was premature, the Court could not assume that the Board would grant the order, in any case the order would not acquire any enhanced validity merely because made, and there was no threat of irreparable injury or violation of right sufficient to justify an injunction.

ARGUED: 2nd July, 1920.
DECIDED: 5th August, 1920.

Statement. APPEAL by defendants from judgment of Galt, J. ([1920] 2 W.W.R. 24) granting the continuance of an injunction to restrain defendants from applying to the Workmen's Compensation Board for an adjudication and determination of the question of the plaintiff's right to compensation under *The Workmen's Compensation Act,* and as to whether the action is one the right to bring which is taken away by the Act. Appeal allowed with costs.

L. J. Reycraft, K.C. and *H. A. V. Green,* for defendants, appellants.

John Allen, for Attorney-General.

D. Campbell and *O. H. Campbell,* for plaintiff, respondent.

The judgment of the Court was delivered by

PERDUE, C.J.M.—This action is brought by the plaintiff who is the widow and administratrix of William McColl, deceased, to recover damages resulting from the death of her husband. She sues on behalf of herself and her infant daughter under R.S.M., 1913, ch. 36, [*An Act respecting Compen-*

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sation to Families of Persons Killed by Accident] commonly called *Lord Campbell's Act,* and *The Railway Act,* 1919, ch. 68, sec. 385. The deceased was killed in an accident that occurred on the defendant's railway and the plaintiff claims that the accident was caused by the negligence of the defendants and by their breach of statutory obligations. On January 7, 1920, the defendants gave notice to the plaintiff of an application to the Workmen's Compensation Board for adjudication and determination of the question of the plaintiff's right to compensation under *The Workmen's Compensation Act,* 6 Geo. V., ch. 125, sec. 13, and amendments thereto. The application was returnable on January 9, 1920. On the day before the application was to be heard the plaintiff applied to and obtained *ex parte,* from Galt, J. an interim injunction restraining the Workmen's Compensation Board and the members thereof from hearing or adjudicating upon the plaintiff's right to compensation under *The Workmen's Compensation Act.* On a subsequent application, to which the Attorney-General was a party, Galt, J. made an order enjoining the defendants from proceeding with the application to the Board.

Under sec. 13, subsec. (2) of *The Workmen's Compensation Act,* any party to an action if brought may apply to the Board for adjudication and determination of the question of the plaintiffs' right to compensation, and as to whether the action is one the right to bring which is taken away by the Act and such adjudication and determination shall be final.

The question whether the Workmen's Compensation Board is, or is not, an inferior Court does not arise on the consideration of this appeal. The plaintiff has not applied for prohibition. She has applied for and obtained an injunction against the defendants to this suit restraining them from making an application to the Board under the above section. The question of the plaintiff's right to this injunction can be disposed of briefly upon the ground that it is premature. The Court cannot assume that the Board will grant the order for which the defendants are applying. In any event an order made by the Board cannot merely because it has

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been made acquire any enhanced authority or validity. There is no threat of irreparable injury or violation of right sufficient to justify the granting of an injunction. The question whether *The Workmen's Compensation Act* applies to or in any way controls the operation of sec. 385 of *The Railway Act, 1919*, can be dealt with when it is properly placed before the Court.

The appeal must be allowed and the order enjoining the defendants set aside. The costs of this appeal will be costs to the defendants in the cause.

Appeal allowed with costs.

COURT OF APPEAL

ANDERSON ET AL v. GISLASON ET AL

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

Churches—Real Property—Trusts and Trustees—Departure of Majority of Congregation from Doctrinal Position—Right of Minority to Church Property.

Where a church organization is formed for the purpose of promoting certain defined doctrines of religious faith which are set forth in its incorporate articles or constitution, the church property which it acquires is impressed with a trust to carry out that purpose, and a majority of the congregation cannot divert the property to inconsistent uses against the protest of a minority however small.

A congregation of the Icelandic Lutheran Church was organized as a voluntary religious association with a written constitution. It was proposed to unite it with the "First Icelandic Unitarian Congregation." In an action brought on behalf of a minority of the former congregation against the trustees holding title to the church property, the Court found that the proposed basis of union with the Unitarian Church would, if carried out, constitute a fundamental departure from the doctrinal position of the said Lutheran Church as set forth in its constitution, and held that the plaintiffs were entitled to a declaration that defendants had seceded from the congregation, were no longer members thereof, and had forfeited all their rights to the property, and that the plaintiffs were entitled to possession thereof, and to an injunction against interference with the plaintiff's use of the property.

Review of cases, *Free Church of Scotland v. Overtoun (Lord)* [1904] A.C. 515, reviewed and followed.

ARGUED: 28th June, 1920.
DECIDED: 5th July, 1920.

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APPEAL by defendants from a judgment of Mathers, C.J.K.B. in favour of the plaintiffs in an action arising out of a dispute between two groups of members of the Icelandic Lutheran Church congregation, involving the ownership of church property. Appeal dismissed with costs.

In 1894 an independent Lutheran congregation was organized in the city of Winnipeg as an unincorporated voluntary religious association with the name of "The Winnipeg Tabernacle" and a written constitution in the Icelandic language. The only articles of this constitution material to this action are Article 2 and Article 11, which read as follows:

"II. Confessions.

"1. The Word of God as revealed in the sacred canonical books of the Scriptures is the true source and the perfect form of doctrine, faith and conduct for this congregation.

"2. This congregation accepts the doctrines of the Sacred Scriptures in the same manner as the Lutheran Church of Iceland by its confessions.

"XI. Property.

"The property of this congregation cannot pass into the hands of others unless the congregation so determines by two-thirds of all votes present at the meeting. The matter must, moreover, have been brought up and discussed at the next preceding meeting. If a division occurs in the congregation the property shall belong to such portion of the congregation as adheres to this constitution."

It was admitted that the confessions of the Church of Iceland referred to in Article 2 are the Apostles Creed, the Nicene Creed, the Athanasian Creed, the Unaltered Augsburg Confession, and Luther's Shorter Catechism. The learned trial Judge found as a fact that in 1894, when this congregation was organized and the constitution adopted, a belief in the five creeds mentioned was required by the Lutheran Church in Iceland as binding tests.

It was alleged in the statement of claim and admitted in the statement of defence that "the said congregation was organized for and as an Icelandic Evangelical Lutheran congre-

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gation, and from the time of its organization it has at all times been, and still is, an Icelandic Evangelical Lutheran congregation, and has maintained the laws, usages, faith, principles, doctrines and form of worship of the Lutheran Church and denomination, and has at all times been served exclusively by pastors of the Lutheran faith and who were members of the Lutheran Church."

The last minister of the congregation died in April, 1918; and, while the congregation was still without a minister, the First Icelandic Unitarian Congregation of Winnipeg made a written offer to the Winnipeg Tabernacle for the union of the two congregations. This offer provided, *inter alia,* that in the constitution of the proposed union congregation no creedal tests should be imposed as a condition for admission to membership, but that the former creeds of the Winnipeg Tabernacle should all be dropped and that the new union congregation should be an absolutely creedless church. This offer was first brought before the Winnipeg Tabernacle at a meeting of the congregation held on January 14, 1919, and referred to a committee for consideration. This committee reported back to the congregation at a meeting held on March 6, 1919. At this meeting the opponents of the union were in the majority, but the chairman (the defendant Thorbergsson) prevented the matter from coming to a vote by arbitrarily declaring the meeting adjourned of his own motion. At a subsequent meeting of the congregation held on March 24, 1919, the question of the proposed union was put to a vote and defeated. Several meetings of the congregation were held between March 24 and May 15, 1919, at none of which this question of union was taken up or discussed. At a special meeting of the congregation held on May 15, 1919, the question of union was again taken up without any previous warning. The notice calling the meeting did not refer to this matter in any way, and a large number of the members of the plaintiff faction were absent from the meeting. At this meeting the defendants, after admitting twelve new members, took up the question of the proposed union, notwithstanding the protests of those members of the plaintiff faction who were present. A resolution that all the offers of the First Icelandic Unitarian

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Congregation for amalgamation be accepted, was declared adopted by a vote of 38 to 16, and a committee was elected to notify the Unitarian congregation.

On May 18, 1919, those members of the congregation who were opposed to the union with the Unitarians held a meeting and passed a series of resolutions declaring that a division had occurred in the Winnipeg Tabernacle within the meaning and contemplation of Article 11 of the constitution and that the persons assembled at the said meeting constituted the true and lawful congregation, and that all members of the congregation who had assisted at the attempted union with the Unitarians are seceders from the faith, and no longer members of the congregation. The office of trustees was declared to be vacant and the plaintiffs were elected new trustees and were authorized to commence the present action.

This action was accordingly commenced on May 22, 1919, by the five persons elected trustees at the meeting of those opposed to the union held on May 18, 1919. They brought the action both as trustees of the congregation and also individually on behalf of themselves and all other members of the said congregation associating and acting with them. The five former trustees of the congregation, who had been elected as such at the last annual meeting of the congregation held on January 30, 1919, and all of whom had favoured and promoted the union with the Unitarians, were individually made defendants and all other persons associating and acting with them. On June 30, 1919, Macdonald, J., on the application of the plaintiffs, made a representation order under King's Bench Rule 211 appointing the five individuals named as defendants to represent all other persons in the same interest and providing that the statement of defence already filed by them should stand as a statement of defence on behalf, and for the benefit, of all such other persons.

The action was tried before Mathers, C.J.K.B., the trial lasting five days. He subsequently gave a considered judgment in favour of the plaintiffs in which he held that the charges against the defendants of a departure from the faith were fully established, and that, irrespective of the question

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of departure, the plaintiffs were entitled to relief, because the proceedings leading up to the union were irregular and void. He found that the notice calling the meeting of the congregation held on May 15, 1919, was insufficient to authorize the taking up of the question of union at that meeting, and that it was not in any event validly passed at that meeting as it had not been "brought up and discussed at the next preceding meeting" and had not been voted for by two-thirds "of all votes present at the metting" as required by Article 11, it being shown that at least four members were present who did not vote. He found also that the five creeds referred to above are a fundamental part of the doctrine of the Lutheran Church and were as such adopted by the Tabernacle congregation in its constitution, and that as a congregation it has never departed from them, and that the proposed basis of union with the Unitarian congregation constituted a fundamental departure from the doctrinal position of the Winnipeg Tabernacle as declared in its constitution. He found further that a schism took place in the congregation when the majority resolved to unite with the Unitarian congregation upon a doctrinal basis fundamentally different from that provided for in the Tabernacle constitution, and that under the provisions of Article 11 the church property, therefore, belonged to those who adhered to the constitution. Judgment was accordingly directed to be entered in favour of the plaintiffs with costs declaring that a division has occurred in the congregation within the meaning and contemplation of Article 11 of the constitution, and that the plaintiffs and those associated with them, adhering as they do to the constitution, constitute the true and lawful congregation; that the defendants and those with whom they are associated have seceded from the faith, and are no longer members of the congregation, and have forfeited all their right, title and interest in and to the property of the congregation; that the plaintiffs are the duly elected trustees of the congregation and entitled to the immediate possession of the church property and records, and ordering the defendants to forthwith deliver up to the plaintiffs the keys to the church building and possession of the church property and records; and granting an injunction per-

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petually restraining the defendants, their, and each of their, associates, servants and agents, from in any way interfering with the plaintiffs in the free use, control and possession of the property and records of the congregation.

From that judgment the defendants appealed to the Court of Appeal.

J. T. Thorson, for defendants, appellants.

H. A. Bergman, G. L. Lennox and *G. A. Axford,* for plaintiffs, respondents.

PERDUE, C.J.M. concurs.

CAMERON. J.A.—In 1894, a congregation of the Icelandic Lutheran Church was organized in Winnipeg as a voluntary religious association, with the name of "The Winnipeg Tabernacle" and a written constitution in the Icelandic language. A proposal was made January 14, 1919, that the "First Icelandic Unitarian Congregation" and "The Winnipeg Tabernacle" unite in one congregation on the ground that the views of these congregations were the same. Negotiations were entered on and meetings were held at which opposition was manifested. It was at a meeting on May 15, 1919, that the offer of the Unitarians was finally accepted.

The defendants are trustees elected at the meeting of January 30, 1919, and they hold a certificate of title to the church property.

At a meeting subsequent to that of May 15, 1919, those of the congregation opposed to the union with the Unitarians held a meeting denouncing those who were parties to the union as seceders from the faith, declaring the office of trustees vacant and electing the present plaintiffs new trustees with authority to commence this action.

The object and character of this litigation is to be gathered from the following allegations in the statement of claim:

18. The defendants threaten and intend, unless restrained from so doing, to immediately proceed to carry out the said proposed union of the said congregation with the First Icelandic Unitarian Church of Winnipeg and to use the church building, property and records of the congregation for the benefit and promotion of Unitarian doctrines and beliefs and contrary to and in violation of the constitution and faith of the congregation and contrary to and in violation of the faith, doctrines and practice of the Lutheran

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Church, and threaten and intend to conduct, or permit to be conducted in the church, and in the name and under the auspices of the said congregation religious services at which Unitarian clergymen officiate.

19. The doctrines, beliefs, rites and forms of worship of the Lutheran Church and of the said congregation are vitally, essentially and fundamentally different from those of the Unitarian Church. One of such fundamental doctrinal differences is that the Lutheran Church and the said congregation adhere to and believe the Trinitarian doctrine of the Godhead and adhere to and believe in the divinity of Jesus Christ, while the Unitarian Church teaches and believes the Unitarian doctrine of the Godhead and denies the divinity of Jesus Christ.

The plaintiffs ask for a declaration that the meeting of the congregation of May 15, 1919, was illegal; a declaration that a division has occurred in "The Winnipeg Tabernacle" within Article 11 of the constitution, that the defendants are seceders and no longer members; a declaration that the plaintiffs are duly elected trustees of the congregation and entitled to possession of its property; and an injunction restraining the defendants from carrying out the proposed union or from in any way interfering with the plaintiffs in their use of the property.

In the statement of defence, the defendants admit the passage of a resolution at the meeting held May 15, 1919, that the offer of the First Icelandic Unitarian Church for amalgamation be accepted and they further admit that they intend to give effect to such resolution, but deny that they intend to use the church building in violation of the constitution and faith of the congregation and in violation of the faith, doctrines and practices of the Icelandic Lutheran Church.

The action was tried before the Chief Justice of the Court of King's Bench who gave judgment for the plaintiffs in the terms asked in the statement of claim. From that judgment, in which the facts and documents are fully set forth, this appeal is taken.

It will be seen that the questions involved in the litigation are of great importance. We are fortunate in having for our guidance the decision of the House of Lords in *Free Church of Scotland v. Overtoun (Lord)*, [1904] A.C. 515, 91 L.T. 394. That case, after an argument extending over eight days, was ordered reargued and the reargument took nine days (p.

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559). The history of the Free Church of Scotland which was founded in 1843 by secession from the Established Church of Scotland as a protest against interference by the state in matters spiritual is set forth in the report. Its two main doctrines were the Establishment principle and the unqualified acceptance of the Westminster Confession of Faith. For several years an attempt was made to bring about a union between the Free Church and the United Presbyterian Church, which was in its essence opposed to the Establishment principle and did not uphold the Westminster Confession in its entirety. In 1900 Acts of Assembly were passed by the majority of the Free Church and the Free Church property was conveyed to new trustees for the benefit of the new church. The minority of the Free Church objected that it (the Church) had no power to change its doctrines, or unite with a body that did not confess those doctrines and complained of a breach of trust and asked for a declaration that they were entitled to the property.

It was held that the Establishment principle and the Westminster Confession were distinctive tenets of the Free Church, which had no power, where property was concerned, to alter or vary the doctrines of the church; that there was no true union and the representatives of the minority were entitled to the property held by the Free Church for its benefit and on its behalf.

Lord Halsbury, in his judgment, makes some instructive and authoritative remarks at p. 613 ([1904] A.C.):

> Now, in the controversy which has arisen, it is to be remembered that a Court of law has nothing to do with the soundness or unsoundness of a particular doctrine. Assuming there is nothing unlawful in the views held —a question which, of course, does not arise here—a Court has simply to ascertain what was the original purpose of the trust.
>
> My Lords, I do not think we have any right to speculate as to what is or is not important in the views held. The question is what were, in fact, the views held, and what the founders of the trust thought important.

This last observation is to be borne in mind when the doctrine of the Free Church in respect of establishment is considered. To the ordinary mind it is difficult to see by what line of reasoning Dr. Chalmers and the other founders of Free Church, holding that it was the duty of the government

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to provide funds for the support of the Free Church minority, could make that belief a dogma, a doctrine of faith, an article of the creed of the Free Church itself. But as Lord Halsbury says the Courts have no authority to speculate as to what is or is not important in the views held. The question is, what, in fact, were the views. He gives those of the United Presbyterian Church which exclude state aid altogether and points out the irreconcilability of the two positions.

Lord Halsbury then goes on to deal with the Calvinistic doctrine of predestination from which it was alleged there was a departure in the proposed terms of union, and on this second ground he holds the minority also entitled to succeed.

The Lord Chancellor discusses the argument that every Christian church has the inherent power to change its doctrines. He disposes of that unanswerably at p. 628 ([1904] A.C.):

> I do not suppose that anyone will dispute the right of any man or any collection of men to change their religious beliefs according to their own consciences; but when men subscribe money for a particular object and leave it behind them for the promotion of that object, their successors have no right to change the object endowed.

The Lord Chancellor expresses his strong inclination to believe that there was no real union between the two bodies, that their administrations have been united but not their doctrines. He says:

> It becomes but a colourable union, and no trust fund devoted to one form of faith can be shared by another communion simply because they say in effect there are some parts of this or that confession which we will agree not to discuss, and we will make our formularies such that either of us can accept it.
>
> Such an agreement would not, in my view, constitute a Church at all, or it would be, to use Sir William Smith's phrase, a Church without a religion. [See citation from *Dill v. Watson*, p. 616]. Its formularies would be designed not to be a confession of faith, but a concealment of such part of the faith as constitutes an impediment to the union.

In the argument addressed to us on behalf of the appellants the ground was taken that the Winnipeg Tabernacle was or had become a creedless church and that there was, therefore, nothing whatever unusual or unauthorized in its accepting or absorbing members of the Unitarian Church which is also a creedless organization. It was urged that the proposed union

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was not so much a union as an enlargement of the Winnipeg Tabernacle by the addition of Unitarian membership. It was further urged that the Tabernacle congregation never regarded the creeds as binding, upheld the right of individual interpretation and withdrew from the Lutheran Synod on that ground. From this point of view a union with the Lutheran Synod was really more objectionable than one with the Unitarians.

It was further contended that the substance of the transaction was that the Unitarian Church was being effaced and absorbed in the Tabernacle. Both congregations deny the plenary inspiration of the Scriptures and both hold that the creeds are not binding and there can, therefore, be no objection to their union.

Counsel for the appellants made what seemed to me on the argument a strong presentation of the appellants' case from these points of view. But the matters here involved are in the main matters of fact. I consider the plaintiffs have established the truth of the allegations made in the statement of claim, more particularly those in the paragraphs above set forth. The finding of the Chief Justice that the proposed basis of union with the Unitarian Church would, if carried out, constitute a fundamental departure from the doctrinal position of the Tabernacle as set forth in its constitution, seems to me unassailable.

As I read the judgments of the House of Lords in the *Free Church Case*—I refer particularly to those of Lord Halsbury, Lord Davey, and Lord James—they seem to me to preclude any possibility of upholding such a transaction as that attempted by the defendants in this case.

We were referred to a number of interesting cases in the American reports, in which reliance is placed on the English decisions which are cited in the *Free Church Case*.

In *Kniskern v Lutheran Churches*, 1 Sandford Ch. Rep. 439, a grant of land was made in 1789 to the trustees of an Evangelical Lutheran congregation, consisting of two churches, "for the common use and benefit of the said Lutheran congregation forever." A house of worship was erected

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by each church—their standard of faith being the Augsburg Confession. In 1830 they joined the Hartwick Synod of the Evangelical Lutheran Church. In 1837, they dissolved their connection with the Hartwick Synod and with other churches formed a new synod, adopting a confession of faith essentially variant from the Augsburg Confession in three cardinal particulars. It was held that these proceedings were a perversion of the trust and an unlawful diversion of the property.

In *Princeton v. Adams,* 64 Mass. 129, a legacy to a church and society "so long as they maintain their present essential doctrines and principles of faith and practice" which were then Unitarian, is forfeited by a change to a trinitarian system of faith and practice.

> From the early days of Christianity they [the trinitarian and unitarian schools] have always been deemed as they have in our day antagonistic systems. And courts have decided that funds given to support the teaching of one of them, are misemployed and perverted when applied to support the teaching of the other, and have redressed such misemployment.

In this case as in the *Kniskern Case* we find cited *Atty.-Gen. v. Pearson,* 3 Mer. 353; *Shore v. Wilson,* 9 Cl. & F. 355; *Atty.-Gen. v. Drummond,* 1 Dr. & War. 353, and other well-known English authorities.

In *Baker v. Ducker,* 21 Pac. Rep. 764, it was held that a majority of the society (First Reformed Church of Stockton) could not change the purpose for which the property was purchased by adopting the different doctrine of a different church and changing its name. In *Lindstrom v. Tell,* 154 N.W.R. 969, a similar holding was made. A majority of the congregation cannot make such a diversion of the property to other inconsistent uses against the protest of a minority, however small.

Rottman v. Bartling, 35 N.W.R. 126, arose in Nebraska. There certain officers and members of the Evangelical Lutheran Church, without giving the required notice, joined "Die Erste Deutsche Evangelische Zions Gemeinde"; it was held that having ceased to be members of the Lutheran Church, they were not entitled to possession of the property of such church.

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The controlling question in this case is whether the plaintiffs and their associates, or the defendants and their associates, constitute the true and legitimate First Evangelical Lutheran Church of Nebraska City. In our view, the testimony clearly shows that the plaintiffs and their associates constitute the First Evangelical Lutheran Church of Nebraska City. In determining the question of legitimate succession of a religious society, where a separation has taken place, a court will adopt the rules of such society, and enforce its polity in the spirit and to the effect for which it was designed. *Harrison v. Hoyle,* 24 Ohio St. 254. If this were not so, it would be possible for a faction in any church, by concerted effort, to change its doctrines and form of government.

The leading case upon this subject is *Attorney General v. Pearson,* 3 Mer. 409, where it was held that if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant dissenters, promoting no doctrines contrary to law, it is then the duty of the court to carry such trust into execution, and to administer it according to the intent of the founders. In the same case, page 400, the chancellor says: "Where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the court. And to refer to any other criterion (as the sense of the existing majority) would be to make a new institution, which is altogether beyond the reach and inconsistent with the duties of the court. The cases of *Craigdallie v. Aikman,* 1 Dow. 1; *Foley v. Wontner,* 2 Jac. & W. 245; *Leslie v. Birnie,* 2 Russ. 114; *Davis v. Jenkins,* 3 Ves. & B. 156; and *Milligan v. Mitchell,* 3 Myl. & Cr. 272, and 1 Myl. & K. 446, recognize the same principles.

The same principle applies in this case. The fact that these defendants did not move off in a body, but sought to retain possession of the church building, does not change the rule. All the testimony tends to show that they have seceded from the Lutheran Church, and as such seceders have no right to the property of the church. *Kniskern v. Lutheran Churches,* 1 Sandf. Ch. 439; *Harrison v. Hoyle,* 24 Ohio St. 254; *Field v. Field,* 9 Wend. 401; *Gable v. Miller,* 10 Paige 627, and 2 Denio, 492; *Church v. Wood,* 5 Ohio, 283.

In *Schnorr's Appeal,* 67 Pa. St. R. 138, the judgment of the Court was delivered by Sharswood, J., who held that where a church has been organized and endowed, whether by donation or subscription, as belonging to any particular sect or in subordination to any particular form of church government, it cannot break off from that connection and government, citing *Atty.-Gen. v. Pearson, supra.* He then goes on to make these observations:

In church organizations those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation and corporation, if incorporated: *Winebrenner v. Colder,* 7 Wright 244. The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law, and

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the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began, are the standards for determining which party is right: *McGinnis v. Watson,* 5 Wright 9. If the opinion of Chief Justice Lowrie in this last case may seem to controvert any of these positions, and to hold that a congregation may change a material part of its principles or practices without forfeiting its property on the ground that to deny this "would be imposing a law upon all churches that is contrary to the very nature of all intellectual and spiritual life"; and because the guarantee of freedom to religion forbids us to understand the rule in this way, I ask leave most respectfully to enter against it my dissent and protest. I do so the more freely because it was entirely extrajudicial to any question in the case. Courts which have the supervision and control of all corporations and unincorporated societies or associations, must be guided by surer and clearer principles than those to be derived from the nature of intellectual and spiritual life. The guarantee of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves. The law of intellectual and spiritual life is not the higher law, but must yield to the law of the land.

In *Gudmundson v. Thingvalla Lutheran Church,* 150 N.W.R. 750, there was a discussion as to the effect of the clause in the constitution of the Church providing: "If a division occurs in the congregation, the property shall belong to such portion as adheres to this constitution"; and it was pointed out that this would have been the rule, even had there been no constitutional provision; p. 769, where a passage from 34 *Cyc.* 1167 is cited. The doctrinal question in issue in the disputes out of which this action arose was that of plenary inspiration.

All these authorities strengthen the conclusion that we cannot regard this Winnipeg Tabernacle as a creedless church or as a religious organization with such designedly ill-defined and flexible doctrines and beliefs as to be, so far as the Christian world is concerned, all inclusive. It was and is plainly not so and it had and has all the outward and visible characteristics of a Christian church. As stated by Lord Halsbury in the *Free Church Case,* ([1904] A.C.) p. 612:

Speaking generally, one would say that the identity of a religious community described as a Church must consist in the unity of its doctrines. Its creeds, confessions, formularies, tests, and so forth are apparently

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intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community.

The legality of the notice calling the meeting of May 15, 1919, when the offers of the First Icelandic Unitarian Congregation for amalgamation were accepted by a vote of 38 to 16, was questioned as not sufficiently stating the business to be transacted thereat. In addition to the cases cited in the judgment of the Chief Justice, I refer to *Pacific Coast Coal Mines v. Arbuthnot* [1917] A.C. 607, 86 L.J.P.C. 172, [1917] 3 W.W.R. 762. I think there can be no question whatever as to the invalidity of the notice, though, in my view, the matter does not really turn on that consideration but on the question of departure.

I was at first impressed with the argument that the judgment had gone too far. The Court interferes in these matters only because property rights are invaded. Why then should the judgment not be restricted to the property alone? It was, therefore, urged that there was no necessity for the declaration in the second paragraph of the formal judgment that the defendants have seceded from the congregation, are no longer members thereof and have forfeited all their rights to the property. Yet in the light of the decisions, this is exactly what has happened to the defendants. And they have brought this state of affairs upon their own heads by their own actions deliberately undertaken and in the face of persistent opposition. I am struck with the remarks of Sharswood, J. in *Schnorr's Appeal,* which I have quoted. The defendants must take the consequences of their actions and of their disregard of the rights of others.

I would affirm the judgment appealed from and dismiss the appeal with costs.

FULLERTON, J.A. concurs.

DENNISTOUN, J.A.—I am in full agreement with the statement of facts and reasons for judgment of the learned Chief Justice of the King's Bench who tried this case and with the formal judgment which has been entered. This appeal has

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been argued exhaustively and much theological learning and research were displayed by counsel. Mr. Thorson, who was not present at the trial and had but a short time to prepare for appeal, presented the case for the appellants with great ability.

A large part of the argument dealt with the binding effect of the three Ecumenical Creeds, the Augsburg Confession and Luther's Shorter Catechism upon the Tabernacle Congregation, and I agree with the learned trial Judge that by the Constitution of 1894 they were adopted by the Congregation and have never been abrogated. Even if effect be given to the argument of the appellants that great latitude of view and freedom of judgment were permitted to members of the Congregation, the fact remains clearly established that this was a Congregation founded and always maintained upon a Trinitarian belief and upon no other. This to my mind is the deciding factor in the case quite apart from the variations of interpretation which are given to that belief by the creeds and quite independently of any of them.

The effort made by a portion of the Tabernacle Congregation to unite with a congregation of professed Unitarians, upon the understanding that there was to be no surrender of belief on the part of either, but against the protest of a very substantial portion of the Tabernacle Congregation, was certain to disrupt the Congregation as it did.

The basis of union which was adopted was nothing more than an agreement to submerge the fundamental differences of belief which divided these separated Christians and to conduct the affairs of the new congregation upon a financial basis profitable to both under the guidance of a pastor (if one could be obtained) who would keep clear of offence to the susceptibilities of either.

Such a congregation might possibly be formed by persons who were entirely like minded, but, in my humble opinion, a substantial portion of a congregation adhering generally to the Lutheran conception of the Trinity of the Godhead, cannot be compelled to share its church property with a large

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body of persons whose conception of the Deity is essentially different.

It is not the duty of the Court to concern itself with the mysteries and niceties of theological doctrine except in so far as may be necessary for the determination of the legal rights of the parties concerned. It was argued that the congregation of the First Unitarian Church of Winnipeg does recognize in certain portions of its liturgy the Father, the Son, and the Holy Ghost, but (it was admitted) with marked qualifications and differentiations of and from the views of the Trinitarians.

Disputations on this and kindred subjects have taken place among professing Christians for centuries and history is full of them. Controversies have raged round the shades of meaning to be given to tenets and doctrines with the result that there is today a multitude of Christian bodies into which the disciples who have grouped themselves in accordance with their common views have been segregated.

These common and conscientious views are entitled to respect, and the Courts have always given full effect to them when dealing with trusts which owe their existence to the tenets and beliefs of the founders. It is only necessary to ascertain what those tenets and beliefs are and having done so to protect those who remain stedfast from the domination of those who would throw off the old chains and forge lighter ones.

In the case at bar there is no difficulty in determining that the plaintiffs stand fast upon the Trinitarian doctrines of the Lutheran church and that the defendants are prepared to surrender to a congregation professing Unitarian doctrines and who may form a majority of the new congregation full rights of membership and a full share in the church property with power to mould the constitution of the congregation as the union of members may see fit. The fact that the Unitarians bring their church property into the merger only complicates the situation and makes it necessary for the Court to interfere before the intermingling of assets can take place.

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A notable case very much in point is *Free Church of Scotland v. Overtoun (Lord)* [1904] A.C. 515, 91 L.T. 394, in which it was held that the identity of a religious community described as a church consists in the identity of its doctrines, creeds, confessions, formularies and tests. The bond of union of a Christian association may contain a power in some recognized body to control, alter, or modify the tenets or principles at one time professed by the association; but the existence of such a power must be proved.

There is no evidence that power was reserved by the founders of this congregation to themselves and their successors to alter the undoubted Trinitarian characteristics of the congregation possessed from its inception.

The Tabernacle congregation is an independent organization owing allegiance to no organized church synod, bishop or other governing body. The constitution by which it is controlled was adopted by vote of the members in 1894. Article XI. under the heading "Property" is as follows:

> The property of this congregation cannot pass into hands of others (individuals or societies) except it be so ordered by a two-thirds vote of all present at a meeting of the congregation. A notice shall have been moved and discussed to this effect, at a meeting next prior thereto. In the event the congregation breaks up then that portion of it that adheres to this constitution shall retain the property.

Article XIII. makes provision for "Amendments" as follows:

> No amendments shall be made to this constitution except such amendments be consented to by a two-thirds vote at a meeting of the congregation. A notice of motion to this effect shall be given and discussed at the next meeting prior thereto.

No amendment of the constitution was made or attempted before the union with the Unitarian Congregation was discussed and voted on, the view of those who desired the union no doubt being that as they were surrendering none of their individual beliefs or tenets, no amendment was necessary.

In my humble judgment they were in error in so thinking. The character of the congregation as a whole was being fundamentally altered and no mental reservations on the part of individual members could preserve the characteristics given to it by its founders.

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So soon as the union was complete a new constitution was to be adopted upon the basis of the Bergman draft and the conditions attached thereto by the joint committee of both congregations. Before such new constitution could be adopted the former constitution must of necessity be abrogated and its references to the confessions of the Lutheran Church of Iceland modified or eliminated.

This would involve a radical departure, a schism, a breaking up, and under Article XI. of the constitution "that portion of the congregation that adheres to this constitution shall retain the property."

Article XI. contemplates a transfer of the church property by a two-thirds vote, the congregation remaining intact, and acting lawfully under the constitution. It also contemplates what has occurred here, and makes provision for the ownership of the property in the event of a "breaking up" of the congregation.

The two-thirds vote required by Article XI. is quite separate and distinct from the two-thirds vote required by Article XIII. These articles deal with totally different sets of circumstances, and methods of procedure.

The defendants have proceeded to deal with the church property in a manner not contemplated by the constitution and without amending the constitution have attempted to overthrow it.

The plaintiffs have resisted and a "breaking up" has taken place as contemplated by Article XI. The plaintiffs, and those whom they represent, have "adhered to the constitution" and the defendants and their following have departed from it, and I concur with the learned Chief Justice of the King's Bench that the constitution must govern and the property be awarded in accordance with its express provisions.

Where a church organization is formed for the purpose of promoting certain defined doctrines of religious faith which are set forth in its corporate articles or constitution, the church property which it acquires is impressed with a trust to carry out that purpose, and a majority of the congregation

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cannot divert the property to inconsistent uses against the protest of a minority however small.

The following decisions of Courts in the United States are very much in point and several of them almost on all fours with the case under consideration: *Princeton v. Adams,* 10 Cushing (Mass.) 129; *Kniskern v. Lutheran Churches,* 1 Sandford Ch. Rep. (N.Y.) 439; *Baker v. Ducker,* 21 Pac. 764; *Lindstrom v. Tell,* 154 N.W.R. (Minn.) 969; *Rottman v. Bartling,* 35 N.W.R. (Neb.) 126; *Ramsey v. Hicks,* 87 N.E.R. 1091; 89 N.E.R. 597; *Schnorr's Appeal,* 67 Pa. St. R. 138.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

COURT OF APPEAL

SUFFIELD v. KENNEDY ET AL

Before PERDUE, C.J.M., CAMERON and FULLERTON, JJ.A.

Practice—Partnership — Form of Claim against Partnership — Partners Sued Individually.

If defendants are sued as "A., B. and C., carrying on business under the firm name and style of A. and Co.," the action is against the partners individually, and a judgment therein "against the said defendants" is against the said individuals.

Practice — Judgment — Default Judgment against Defendant not Served with Statement of Claim—Whether Void or Voidable—Rules 362-364, 621.

A default judgment entered against a defendant who was not served with the statement of claim is only voidable and not void in the sense of being without any legal force or effect; the latter part of Rule 621 (which rule was framed, with other rules grouped with it, to prevent a defendant facilitating judgment against himself by a favoured creditor) must be read in conjunction with Rules 362-364; and if a defendant, knowing of the judgment, allows it to remain a long time unimpeached, the Court may, on the ground of delay and acquiescence, refuse to open it up (per Perdue, C.J. M. and Cameron, J.A.; Fullerton, J.A. dissenting).

ARGUED: 1st October, 1920.
DECIDED: 26th October, 1920.

Statement.

APPEAL by plaintiff from a judgment of Curran, J. reversing an order of the Referee dismissing a motion by defendant

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PERDUE, C.J.M.

Brown to vacate a judgment against him and to set aside a writ of *fieri facias de bonis.* Appeal allowed, Fullerton, J.A. dissenting.

C. H. Locke and *F. Read,* for plaintiff, appellant.

W. R. Mulock, K.C. and *A. MacDonald,* for defendant, respondent, Brown.

PERDUE, C.J.M.—This action was brought in March, 1914, to recover the amount due on a dishonoured cheque for $1,000 made by J. H. M. Kennedy & Co. In the statement of claim the defendants are named as follows: "John H. M. Kennedy, Daniel Brown and Arthur O. Myers, carrying on business under the firm name and style of J. H. M. Kennedy & Company." The statement of claim was served upon the defendant John H. M. Kennedy on March 16, 1914, but does not appear to have been served upon either Brown or Myers. On April 6, 1914, judgment in default of a statement of defence was entered against the defendants as named in the statement of claim.

It is provided by King's Bench Rule 283 that where partners are sued in the name of their firm, the statement of claim shall be served either upon any one or more of the partners, or at the principal place of business of the partnership. It is clear that this Rule would not apply in the present case because the alleged partners are not sued in the name of the firm. Partners may still be sued individually, as under the former practice, if the plaintiff so desires: see *Holmsted's Ontario Judicature Act,* 4th ed., p. 488. But in such case the defendants should each be served with the statement of claim.

About six months after the judgment was signed, Brown, who was conveying a piece of land to a purchaser, found that the judgment had been registered in the land titles office. In order to free his title he paid the plaintiff $55.75 for a release of the judgment in so far as it affected the piece of land he was selling. Brown made the payment on the understanding that he admitted no liability on the judgment and the plaintiff received the payment on that understanding.

The defendant Brown appears to have done nothing further in regard to the judgment until December, 1919, when he

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made a motion to the Referee in Chambers to vacate the judgment as against him and to set aside a writ of *fieri facias de bonis* which the plaintiff had issued against him in August, 1919, under which the sheriff made a seizure of his goods. The Referee dismissed the motion on the ground of laches and acquiescence on the part of the defendant. On appeal, Mr. Justice Curran reversed the Referee and ordered that the judgment be vacated and set aside in so far as it affects the defendant Brown.

Under the old practice, if the plaintiff proceeded in the action as if personal service had been effected without serving the defendant, the proceedings might be set aside. They would not, however, have been null but only irregular and an application to set them aside would have to be taken within the time for moving against an irregularity: *Archbold's Queen's Bench Practice,* 12th ed., 211; citing *Holmes v. Russell,* 9 Dowl. 487; *Sheehy v. Professional Life Assur. Co.,* 13 C.B. 787, 22 L.J.C.P. 244. In *Holmes v. Russell,* Coleridge, J., giving the judgment of the Court of King's Bench held that non-service of the writ of summons rendered the judgment irregular but not a nullity and that a delay from February 15 to the third day of the following term operated as a waiver of the irregularity.

The present practice as to the effect of non-compliance with the Rules is stated in the King's Bench Rules 363-364. By Rule 363:

> Non-compliance with any of the rules shall not render any proceeding in any action or matter void, unless the court or a judge so direct; but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, in such manner and upon such terms as the court or judge thinks fit.

By Rule 364:

> No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

The respondent, Brown, however, relies on Rule 621, which is as follows:

> 621. In no case shall any judgment be signed in an action until a statement of claim has been duly issued and served therein, and the time allowed by rule 182 or rule 183 for filing a statement of defence, has

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expired. A judgment signed in contravention of this rule and all proceedings thereupon or thereunder shall be void, but a judge shall, nevertheless set aside the same upon application in chambers.

This Rule, which is not found in the English or Ontario Act, is in our Act grouped with the Rules forbidding confessions of judgment and other means theretofore existing by which a defendant facilitated judgment against himself in a suit brought by a favoured creditor. Rule 621 was framed to put a stop to that practice. The expression "until a statement of claim has been duly issued and served therein," means the issuing and serving of a statement of claim in accordance with the Rules provided for the taking of such proceedings. The words, "and the time allowed by rule 182 or rule 183 for filing a statement of defence has expired," means that the judgment shall not be signed too soon through the connivance of the defendant. The latter part of Rule 621 must be read in conjunction with Rules 362-364. The word "void" must therefore be construed with reference to the provisions of Rule 363 as "voidable," and the application to set aside the judgment must be made within a reasonable time under Rule 364.

In *Reynolds v. Coleman,* 36 Ch. D. 453, 56 L.J. Ch. 903, the defendant moved to set aside a judgment against him, on the ground that the order allowing service of the writ upon him in America had been improperly obtained, and on the further ground that the Court had not jurisdiction to make it. There had been a delay of a little over a year in making the motion. It was held, both by Kay, J., and the Court of Appeal, that the defendant was too late in bringing the motion. I would also refer to the case of *McLean v. Smith,* 10 P.R. 145, mentioned by the Referee.

In the present case the defendant after becoming fully aware of the existence of the judgment against him waited for over five years before moving to set it aside. In the meantime the defendant Kennedy has died and the defendant Myers is not available to give evidence as to the existence of the partnership. From the affidavits filed I am by no means satisfied that Brown has shown that he was not a partner. There are many circumstances that tend to show that he had allowed himself to be held out as a partner. He was much

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involved in the firm's transactions. He appears to have been generally regarded as a partner. He was sued as a partner in at least one other action in which he, Kennedy and Myers, through their solicitors, paid money into Court in satisfaction of the claim. He has allowed the judgment in the present case to remain in force against him unimpeached until by lapse of time and the disappearance of necessary evidence to show his connection with the firm, the plaintiff's position in respect to that issue has been greatly impaired.

On the ground of delay and acquiescence I think the judgment should not now be opened up. I would allow the appeal, set aside the order appealed from and restore the Referee's order. The defendant Brown will be ordered to pay the costs of this appeal, of the motion to the Referee and the appeal therefrom to Curran, J.

CAMERON, J.A. concurred with Perdue, C.J.M.

FULLERTON, J.A. (dissenting)—The statement of claim in this action, which was issued on March 7, 1914, described the defendants as "John H. M. Kennedy, Daniel Brown and Arthur O. Myers, carrying on business under the firm name and style of J. H. M. Kennedy & Co." The plaintiff served only John H. M. Kennedy. On April 6, 1914, judgment was entered as follows: "It is this day adjudged that the Plaintiff recover against the said defendants $1,030.00 and $24.95 costs taxed." Notice of motion dated December 19, 1919, was given on behalf of the defendant Daniel Brown to vacate and set aside the judgment on the ground that he had not been served with the statement of claim. The learned Referee dismissed the application. On appeal Mr. Justice Curran set aside the order of the Referee and opened up the judgment.

Rule 283 of the *King's Bench Rules* provides as follows:

> Where partners are sued in the name of their firm, the statement of claim shall be served either upon any one or more of the partners or, at the principal place within Manitoba of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm.

No doubt the judgment in this case was entered on the strength of this Rule. While I know that it has been the

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FULLERTON, J.A.

practice in suing a firm to describe the defendant as "* * * and * * * carrying on business under the firm name and style of * * *," I cannot see how it can be justified by the Rules of the Court of King's Bench. The Rule says "Where partners are sued *in the name of their firm.*"

In *Chitty's Forms,* p. 607, under the heading "Actions by and against Firms" I find the following:

> Writ of Summons. Same as usual, describing the plaintiff or defendant partners by the name of their firm, e.g., as "A.B. & Co.," or "C.D. & Son." If the defendants be described as "A.B. and C.D., trading as A.C. & Co.," the action will be, not against the firm, but against the individual partners.

I think the action in this case was against the individual partners and the judgment as entered "against the said defendants" is clearly agaist the individual partners.

No service of the statement of claim having been made on Brown, the judgment entered against him was clearly irregular if not entirely void.

If irregular only, Brown cannot succeed. He knew of the judgment shortly after it was entered and allowed nearly six years to elapse before applying to open it up. In the meantime Kennedy has died, the whereabouts of Myers doubtful and the books and documents of the firm probably not obtainable.

The contention is that the judgment is absolutely void. Rule 621 of the King's Bench Rules provides: [See *ante,* p. 556]. Does the word "void" as used in this Rule really mean void or only voidable?

Rule 363 provides that

> non-compliance with any of these rules shall not render any proceeding in any action or matter void, unless the court or a judge so directs * * *.

Hence we have a general Rule saying that non-compliance with any of the Rules shall not render a proceeding void and a specific Rule saying that a judgment entered in default of service shall be void.

In *Smurthwaite v. Hannay* [1894] A.C. 494, at p. 501, 63 L.J.Q.B. 737, Lord Herschell said:

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I cannot accede to the argument urged by the respondents, that even if the joinder of the plaintiffs in one action was not warranted by the rules relied on, there was a mere irregularity of which the plaintiffs, by virtue of Order LXX, [the non-compliance rule] could now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity.

The entry of the judgment in this case was clearly forbidden by Rule 621, and I think the word "void" as used in that Rule means void in the sense of being without any legal force or effect.

If I am correct in this view, the delay of the defendant in making his application would not be a bar to his success.

I would dismiss the appeal.

Appeal allowed, Fullerton, J.A. dissenting.

COURT OF APPEAL

REX v. ARMSTRONG

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

Criminal Law—Intoxicating Liquors—The Manitoba Temperance Act—Conviction Charging Alternative Offences — Uncertainty for Which Offence Penalty Imposed.

Sec. 49 of *The Manitoba Temperance Act* covers three distinct offences, viz., to have, to keep, to give, liquor, otherwise than as allowed therein. A conviction charging that accused "did have, keep or give liquor," etc., and imposing a penalty "for his said offence" of $200 (the minimum penalty under sec. 65 for each offence) and costs, was quashed; as it did not show on its face of which offence accused was convicted and in respect of which the penalty was imposed; amendment being impossible for the same reason.

ARGUED: 4th November, 1920.
DECIDED: 29th November, 1920.

Statement.

APPLICATION to quash a conviction made under sec. 49 of *The Manitoba Temperance Act.* Conviction quashed.

J. P. Foley, K.C., for the accused.
John Allen, K.C., for the Crown.

The judgment of the Court was delivered by

FULLERTON, J.A.—This is an application to quash a conviction made under sec. 49 of *The Manitoba Temperance Act,*

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ch. 112, Manitoba Statutes, 1916. The offence charged is stated in the conviction as follows:

For that he, the said Alex. Armstrong, on the 3rd day of October, A.D. 1920, at the City of Portage la Prairie, in Province aforesaid, *did have, keep or give* liquor in a place other than the private dwelling house in which he resides without having first obtained a druggist's license authorizing him so to do.

The penalty adjudged "for his said offence" was the sum of $200 and $6.85 costs.

Sec. 49 clearly covers three distinct offences, viz., to have, to keep, to give.

Under sec. 65 the penalty for each offence is not less than $200 nor more than $1,000. The magistrate has no discretion as to reducing the fine below $200.

The main objection taken to the conviction is that it charges one of three offences, imposes a penalty for one offence and it is impossible to say what offence is intended.

Prior to the passing of 11 & 12 Vict. ch. 43, two or more offences could be charged in one information, but when the penalty imposed was in respect of one offence only it was always held that it must show on the face of the conviction the offence in respect of which the penalty is imposed.

In *Rex v. Salomons,* 1 Durn. & East 249, two offences were charged in the information and the conviction was for "the said offence." The Court held the conviction bad on the ground that the defendant was charged with two offences and was convicted of the said offence, so that it did not appear of which offence he was convicted.

In *Reg. v. Young,* 5 O.R. 184 *a,* the defendant was convicted under sec. 41 of R.S.O., ch. 181, for selling liquor without a license, and under sec. 46, for allowing liquor to be consumed on the premises, and one penalty was inflicted "for his said offence." It was held that the conviction was bad, in not showing for which offence the penalty was imposed.

Another indispensable property of a conviction is certainty. But as there will be occasion to illustrate this more particularly afterwards, it may suffice at present to observe, that the same rule holds true with equal strictness in convictions as in indictments, viz., that the charge should be positive and certain, in order that the defendant may be protected from

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a second accusation for the same fact; and in order also that the judgment may appear appropriate to the offence. An offence, therefore, cannot be charged disjunctively, or in the alternative, in a conviction, though it may perhaps be so in an order. [*Paley's Summary Convictions*, p. 196.]

It is clear, therefore, that at common law the conviction in this case is bad. Is there anything in *The Manitoba Temperance Act* which justifies it? We have been referred to secs. 77, 96, 100 and 101 of the Act. Sec. 77 authorizes several charges of contravention of the Act to be included in one information. Sec. 96 says that

one conviction for several offences, and providing a separate penalty for each, may be made under the Act although such offences may have been committed on the same day.

Neither of these sections helps and I can find nothing in the Act to authorize a conviction in the form in which this conviction is made.

We cannot amend the conviction under sec. 101 for it is impossible to say for which of the three offences charged the defendant has been convicted.

Since writing the above I have found a case practically on all fours with this decided by Meredith, C.J.C.P. in February, 1920. *Rex v. Kaplan*, 47 O.L.R. 110.

There the defendant was charged that he did unlawfully "have or give liquor."

While in this case there were other grounds upon which the conviction was held bad, Meredith, C.J.C.P., at p. 113, dealing with the alternative form of the conviction, said:

So, too, I have no doubt, the conviction in the alternative form is bad. Convictions must be certain for obvious reasons.

After referring to several sections of *The Ontario Temperance Act*, he proceeds:

But I have found nothing, and nothing has been referred to, authorizing a conviction in the alternative: it would be extraordinary if there were any such power. So that, apart from the question of time, I cannot think that the conviction, being in the alternative, could be sustained.

The conviction should be quashed.

Conviction quashed.

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COURT OF APPEAL 1920

MORTGAGE AND AGREEMENT PURCHASING COMPANY, LIMITED v. TOWNSEND

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

Damages—Breach of Contract—Loss of Profits—Breach of Covenant to Break Land—Loss of Crop.

A vendor in an agreement of sale of land in March, 1918, covenanted that if there was not broken and under cultivation on the land at least 250 acres he would as soon as weather conditions permitted in the spring of 1918 the working and operation of his traction engine, break up sufficient land to bring the cultivated land up to a total of 250 acres. The shortage of cultivated land was 102 acres. He broke 57 acres in 1918 but too late for cropping purposes, and no more. The Court found that it was possible to have done the breaking in time for a 1918 crop had reasonable effort been made.

Held, it was a reasonable inference from the covenant and the circumstances that the use of the land for cropping purposes in 1918 was in contemplation of the parties; it was also in their knowledge that a postponement of the breaking beyond the proper time for making use of the land would result in the loss of those ordinary profits which might have been reaped; and therefore damages should be allowed for loss of the potential crop of 102 acres in 1918; review of authorities on allowance of damages for loss of profits; the damages allowed by the trial Judge (Curran, J. [1920] 3 W.W.R. 7) were reduced; there was also allowed the cost of breaking that portion not broken at all under the covenant.

In the case of an inexcusable breach of contract the party wronged is entitled to every reasonable presumption as to the benefit he might have obtained by the *bona-fide* performance thereof.

ARGUED: 5th November, 1920.
DECIDED: 29th November, 1920.

APPEAL by plaintiff from judgment of Curran, J. ([1920] 3 W.W.R. 7) on defendant's counterclaim for damages for breach of covenant to break land. Damages reduced; costs of appeal to plaintiff. **Statement.**

O. H. Clark, K.C., for plaintiff, appellant.
C. H. Locke, for defendant, respondent.

PERDUE, C.J.M. concurs.

CAMERON, J.A.—This action was brought for the recovery of the sum of $16,954, alleged to be due by the defendant for interest and principal on an agreement dated March 6 1918 for the purchase of certain lands near Clandeboye, in this province, for the sum of $16,800. In the action the defendant

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counterclaimed for damages alleged to have been sustained by the defendant by reason of the breach of the following covenant in the agreement:

> The vendor covenants with the purchaser that if there is not now broken and under cultivation on the said lands at least 250 acres then he will as soon as weather conditions permit, in the spring of the year 1918, the working and operation of the tractor engine now owned by the vendor, enter unto the said lands and break up sufficient land to bring the cultivated land on the said premises up to a total of 250 acres.

The amount due for instalments of principal and interest was paid into Court and the action was accordingly dismissed by Mr. Justice Curran ([1920] 3 W.W.R. 7) pursuant to King's Bench Rule 259, without prejudice to the defendant's counterclaim. He then proceeded with the trial of the issues raised by the counterclaim and gave jugdment for the defendant for $3,075.

Of the breach of the covenant there was and is no question. The trial Judge held the measure of damages, directly referable to the plaintiff's breach, to be the defendant's loss of the potential crop of the 102 acres admitted to be the actual shortage of lands not broken and in cultivation on March 8, 1918. He arrived at the value of this potential crop by reference to crops grown in similar land in the vicinity. The defendant's son, a student at the Agricultural College, gave evidence of net profits of $31.62 per acre from flax grown on this farm in 1918 at a selling price of $2.75 per bushel and of $27.50 per acre from oats.

The trial Judge states that he proposes to be under rather than over the mark and in assessing the potential value of the crops on the 102 acres allows $15 per acre, or $1,500 on this account. For the loss of the crop on 45 acres in 1919 he allowed at the same rate, or $675, an item which was abandoned by notice served shortly before the argument before us. For the cost of brushing and breaking the 45 acres admittedly left undone by the plaintiff, he allowed the sum of $20 per acre or $900 and entered a verdict on the counterclaim for $3,075.

The trial Judge was sitting as a jury and his findings are not to be disturbed without good reasons therefor. We have before us, however, in his judgment the precise method in

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which he arrives at his conclusion and this method is directly challenged as unwarranted on legal principles. The question involved is one of difficulty not so much in ascertaining those principles as in determining their application.

The rules governing damages arising out of breach of contract laid down in *Hadley v. Baxendale,* 9 Ex. 341, 23 L.J. Ex. 179, are set out in *Mayne on Damages,* pp. 13 and 14, and need not be restated. The author says that the rule is supposed to lay down three rules which he sets out at pp. 13 and 14, and which are regarded as authoritative statements.

Remoteness is held to be a ground of exclusion in applying the principles by which the assessment of damages is governed.

> Damage is said to be remote, when, although arising out of the cause of action, it does not so immediately and necessarily flow from it, as that the offending party can be made responsible for it. [*Mayne on Damages,* p. 54.]
>
> The first, and in fact the only inquiry, in all these cases is whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character if it can be shown to be such a consequence as, in the ordinary course of things, would flow from the act, or in cases of contract, if it appears to have been contemplated by both parties. [*Ibid.*]

Otherwise the damage is too remote.

Damages are held to be too remote where the plaintiff claims compensation for the profits he would have made, if the defendant had carried out his contract. It is by no means true, however, that such profits can never form a ground of damage. *Ibid,* p. 64.

A person who fails to supply a piece of mechanism, which is, and which he knew to be, only valuable as forming part of an entire machine, will be responsible for any loss of profits flowing from the inutility of that which it was intended to complete. *Hydraulic Engineering Co. v. McHaffie,* 4 Q.B.D. 670, 27 W.R. 221, cited, *Mayne,* pp. 67, 68.

The question comes to this: Is the particular result such as might have been contemplated by the parties, as naturally flowing from the act done? *Ibid,* p. 73.

On this branch of the case it was contended that it could not be said, having regard to the covenant in question, that there

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could have been contemplated a loss of a future crop as a result of its breach and that damages to be recoverable must be in contemplation of the parties who must have agreed that these arise from the breach. In support of this we were referred to *Mayne,* p. 11, where *British Columbia Saw Mill Co. v. Nettleship,* L.R. 3 C.P. 499, 37 L.J.C.P. 235, is referred to. In that case the defendant had failed to ship from Glasgow an essential part of machinery required for the plaintiff's mill at Vancouver Island. It was held that the measure of damages was the cost of replacing the lost parts in Vancouver Island. A claim made for compensation for the loss of profits while the mill remained idle was not allowed. Willes, J. says, p. 509 (L.R. 3 C.P.):

> To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.

In *Horne v. Midland Ry.,* L.R. 8 C.P. 131, 42 L.J.C.P. 59, the plaintiffs sued for the loss of profits on the sale of shoes to the French government. The defendants were notified of the necessity for prompt delivery. They were not delivered in the time specified and were rejected. It was held that the plaintiffs were not entitled to recover the difference between the price at which they had contracted to sell the shoes and the price ultimately realised, the damage not being such as might be reasonably considered as arising from the defendant's breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract. It was also held in the same case by Blackburn, J. and Martin, B. that a mere notice is not sufficient but to have any effect it must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss. This dictum is cited in the footnote in 10 *Halsbury,* 314; but in *Sedgwick on Damages,* p. 291, it is criticized and the weight of authority is said to be against it, citing *Cory v. Thames Ironworks Co.* (1868) L.R. 3 Q.B. 181, 37 L.J.Q.B. 68, where the plaintiffs purchased a floating derrick intending to use it for a certain novel purpose while the defendants agreed to con-

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struct it believing it was to be used for an entirely different purpose. It was held that the plaintiff could recover damages on the latter basis.

There can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed that the article would be applied to the ordinary purposes to which it was capable of being applied [per Cockburn, C.J., at p. 190 (L.R. 3 Q.B.)]

Reference was also made to *Sapwell v. Bass,* [1910] 2 K.B. 486, 79 L.J.K.B. 932. The defendant, the owner of a stallion, had agreed that the defendant's stallion should serve one of the plaintiff's brood mares. The contract was broken and the plaintiff sued for damages on the footing that he had lost a valuable foal. It was held that the damages were too remote and contingent. Also to *Steinacker v. Squire,* 30 O.L.R. 149, 5 O.W.N. 556, and *Sinclair v. Walker* [1917] 2 W.W.R. 321, cases based on similar facts, but these breeding cases are obviously of a special and speculative character and are hardly applicable to that before us.

It was argued for the defendant that the wording of the covenant, and in particular, the use of the words in it "as soon as weather permits," the occupation of the defendant, and the circumstances of the purchase lead to the inference that it was in the contemplation of both parties that the land in question should be broken and made ready for crop purposes in 1918, that the breach of the covenant was flagrant and inexcusable and that the damages allowed were occasioned directly by the breach, and are reasonable and justified by the evidence. "Loss of profits can be recovered if reasonably within the contemplation of the parties." *Chitty on Contracts,* 16th ed., 885, and it was argued that such was the case here. Numerous decisions were cited to the same effect. In *Jaques v. Millar,* 6 Ch. D. 153, 47 L.J. Ch. 544, in addition to judgment for specific performance of an agreement to grant a lease, damages were awarded the plaintiff for loss of profits from his trade during the time he was kept out of possession. In *The "Argentino,"* 14 App. Cas. 519, 59 L.J.P. 17, Lord Herschell held, at p. 523, that the loss of the use of a vessel when it was under repair owing to a collision and therefore not available for trading purposes was certainly damage di-

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rectly flowing from it, and that such damages would not be necessarily limited to the money that could have been earned while the vessel was actually under repair. In *Lepla v. Rogers* [1893] 1 Q.B. 31, 5 R. 57, loss sustained by fire to premises sublet without consent of the lessor was allowed, in the circumstances, as the natural result of the breach of the covenant not to sublet without leave. In *Wilson v. Northampton and Banbury Ry.*, L.R. 9 Ch. 279, 43 L.J. Ch. 503, the refusal of the company to erect a railway station according to agreement was held to give the right to the plaintiff to have the probable benefit to the plaintiff's estate of the construction of the station taken into consideration and other probable profits which it was declared, though more or less indefinite, were proper for consideration by a jury. In *Hydraulic Engineering Co. v. McHaffie, supra,* the plaintiffs were held entitled to the expenses incurred and the loss of their profit on their other contract with Justice which was dependent on the contract with the defendant. It was held it was fully implied that the plaintiffs would hold the defendants responsible for any loss sustained by the defendants' default if thereby the plaintiffs became unable to carry out their contract with Justice. Other cases were cited, all varying in their facts, and leading to the conclusion that in certain circumstances the loss of profits is allowable as damages.

In *Simpson v. L. & N.W. Ry.*, 1 Q.B.D. 274, 45 L.J.Q.B. 182, there was a claim for loss of time or loss of profit due to non-delivery of goods intended to be exhibited at an agricultural show. Lord Cockburn says at p. 277 (1 Q.B.D.):

> As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be a matter of speculation, but that is no reason for not awarding any damages at all.

It was held that the carrier had notice of the plaintiff's object in sending the goods and that the loss of profit was a natural consequence of the failure of the object. This is a strong case against a carrier.

In *Rivers v. George White, Sons & Co.* [1919] 2 W.W.R. 189, 46 D.L.R. 145, a judgment allowing plaintiff damages for breach of warranty of a threshing machine was varied by

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adding damages for loss of profits. Chief Justice Haultain points out that the suggestion in some decisions that there must be something akin to a contract to enable a party to recover for special consequences of a breach of contract is not sustained by later authorities. He cites with approval on this subject an article by Mr. F. E. Smith in vol. 16 of the *Law Quarterly Review*, where it is stated, at p. 286:

> In determining what consequences the parties may be reasonably supposed to have contemplated the knowledge of the circumstances under which the contract was made must be, not merely an important, but the decisive consideration.

It is impossible to cover the entire range of cases. The distinctions that are drawn seem at times narrow and elusive. It is, as has been observed, like attempting to draw a line between day and night, where there is a twilight zone that is neither.

In *Canada Foundry Co. v. Edmonton Portland Cement Co.*, 10 Alta. L.R. 232, [1917] 1 W.W.R. 382, a mechanics' lien action was brought in which the plaintiff's claim was undisputed save in some small items and at the trial before Walsh, J. judgment was entered for $12,740.35. The real contest was over the counterclaim, in which the defendant claimed damages in the pleadings for $108,000, but at the trial reduced to $78,714.15, for loss of profits sustained by reason of the plaintiff's failure to supply and erect the material contracted for within the time agreed. Mr. Justice Walsh refused to give the full amount claimed on the ground of defects in the calculations and on the authority of *Leonard & Sons v. Kremer*, 48 S.C.R. 518, 4 W.W.R. 332, 26 W.L.R. 568, but considered that the defendant company was entitled to some damages for loss of profits and fixed them at $10,000. There were other considerations entering into the case which do not concern us here. This judgment was affirmed by the Court of Appeal. Mr. Justice Stuart in his judgment deals at length with the facts and the quantum of damages and carefully reviews the decisions many of which I have already mentioned (pp. 255 *et seq*). He refers to the passage in *Mayne on Damages* at p. 64 which I have cited, *Chaplin v. Hicks* [1911] 2 K.B. 786, 80 L.J.K.B. 1292, and *Leonard &*

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Sons v. Kremer, supra, which had been followed by the trial Judge. He then deals with *Hadley v. Baxendale, supra,* and *British Columbia Saw Mill Co. v. Nettleship, supra,* and holds that the idea suggested in that case by Willes, J. that there must be practically a contract with regard to loss of profits before they can be recovered, which is to be found also in *Horne v. Midland Ry., supra,* and in *Elbinger Actien-Gesellschaft v. Armstrong,* L.R. 9 Q.B. 473, 43 L.J.Q.B. 211, is answered by Cotton, L.J. in *Hydraulic Engineering Co. v. McHaffie, supra,* and in the judgments of Bowen and Fry, L.JJ. in *Hammond v. Bussey,* 20 Q.B.D. 79, 57 L.J.Q.B. 58. Mr. Justice Stuart considers *Simpson v. L. & N.W. Ry.,* which I have quoted, a very strong case in favour of awarding damages for loss of profits. He refers to other similar cases where damages have been given for loss of profits (or rather prevention of gains) and points out that the Courts have hesitated in such cases more in actions against carriers than against manufacturers and builders. He concludes by holding the amount fixed by the trial Judge as not too large and that there was clearly a loss of at least that amount. He adds that to be deprived for five months of the use of the buildings should be compensated for in damages quite aside from the profits and that such damages would be found to be as much as $10,000 in any case. In the result the plaintiff's appeal against the judgment of the trial Judge on the counterclaim and the defendant's cross-appeal to increase the damages were both dismissed.

The plaintiffs appealed to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal. The judgment of Lord Atkinson dismissing the appeal is to be found in [1918] 3 W.W.R. 866. Lord Atkinson states the method adopted by the trial Judge in arriving at the amount of damages and points out that

> no question arose as to any loss of profit by the respondents on any particular contract or transaction. The profits which they claimed to have lost were merely those which the sale in the open market of what they could have produced would have enabled them to reap [p. 875.].

He goes on to say:

> It is clear upon the evidence that both parties knew the purpose for which this factory was designed, namely, the manufacture of Portland

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cement for sale. They were both necessarily well aware that the installation of machinery within it was indispensable for this purpose, that the completion of the building was the necessary preliminary of the installation, that delay in the completion of the building necessarily involved the postponement of the latter, and that the loss of the use of the machinery which could not be installed would result in the loss of those ordinary profits which might have been reaped upon what, if worked, it would have produced. So that the loss of this profit was at once what fairly might be considered as arising naturally, that is, according to the ordinary course of things from the breach of the appellants' contract complained of, and was also such a loss as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. If so both the tests laid down in *Hadley v. Baxendale, supra,* and the cases which have followed it would appear to be satisfied. The damages in addition appear to be very moderate in amount. The Court of Appeal approved of the amount.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed, and the appeal be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the present case both parties knew that the object of the covenant to break the land in question was to make it ready for cultivation. The land was to be broken as soon as conditions of weather permitted, obviously to permit its use as soon as possible. I think it must be taken as established that certain crops can be grown profitably on freshly broken land. It can further be reasonably inferred from the covenant itself and the circumstances of the purchase that this use of the land in question was in contemplation of the parties, and that a postponement of the breaking beyond the proper time for making use of the land would result in the loss of those ordinary profits, which might have been reaped, was likewise in their knowledge. The knowledge of the circumstances is a decisive consideration.

The question of *quantum* is difficult. The defendant claims $3,900 in his pleadings, an amount in excess of the price of the land which was bought at $35 per acre. This claim is, to my mind, altogether out of proportion and extravagant. The calculations submitted to the trial Judge of the possible net profits from raising flax and oats seem to me defective and unsatisfactory. They are based on unusually high prices and assume ample returns, and do not make adequate allowance for labour and other elements of costs which may be difficult to arrive at but cannot be ignored. The trial Judge reduced

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these calculations in fixing his estimate of the net profit of the crops which might have been grown but for the plaintiff's breach at $1,500. I think myself an allowance of say $10 per acre, or $1,000, would be adequate. That would certainly be ample in ordinary circumstances.

No objection was taken to the allowance for breaking the land except that it is excessive and that branch of the case was not pressed. The item of $675, loss of crop on 45 acres, was abandoned shortly before this motion came on to be heard.

Amongst other grounds urged on the appeal it was contended that the defendant could have taken steps to avoid or minimize his loss. The evidence does not sustain this contention. Nor can I accede to the argument that the dismissal of the action necessarily disposed of the counterclaim.

While the estimate of the defendant's damages I have arrived at may seem still large, it is to be remembered that this is a case of an inexcusable breach of contract and that the defendant is entitled to every reasonable presumption as to the benefit he might have obtained by the *bona fide* performance of the contract, as pointed out by Lord Selborne in *Wilson v. Northampton and Banbury Ry., supra.*

The judgment entered will be varied by reducing it from the sum of $3,075 to $1,900.

The plaintiffs are entitled to their costs of this appeal.

FULLERTON, J.A.—I have had the advantage of reading the very full and carefully considered reasons for judgment of my brother Cameron and I agree with his conclusions.

DENNISTOUN, J.A. concurs.

Damages reduced; costs of appeal to plaintiff.

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COURT OF APPEAL

ST. VITAL INVESTMENTS, LIMITED

v. HALLDORSON AND CLEMENTS

Before PERDUE, C.J.M., CAMERON, FULLERTON and DENNISTOUN, JJ.A.

Companies—Land Company—Sale of Land by Company—The Companies Act S. 68—Sale Effective without Special By-Law of Directors.

Sec. 68 of *The Companies Act* providing that a land company may make an agreement of sale, etc. "without the assent of the shareholders, and it shall be sufficient if each such * * agreement be specially authorized by a by-law passed by the board of directors," is enabling and not restrictive; it does not abrogate the right of a land company to dispose of its lands in any manner that was effective before its passing (per Cameron, Fullerton and Dennistoun, JJ.A.).

The shareholders of a land company passed a by-law providing for the directors subdividing land and reselling it at such price and terms as they from time to time should deem advisable, and for their passing such resolutions and by-laws as might prove necessary to carry out such objects. The directors by resolution accepted a proposed plan of subdivision, fixed the prices, and authorized certain agents to sell the land in accordance therewith on such terms as they might deem fit. *Held*, an agreement of sale executed in proper form and on which the purchaser had made a payment was enforceable by the company without proof of a by-law of the directors specially authorizing the agreement.

Houghton Land Corpn. v. Ingham, 24 Man. R. 497, 6 W.W.R. 1275, and, (on appeal to the Supreme Court of Canada) 10 W.W.R. 1252, distinguished (per Perdue, C.J.M.) and discussed and explained as not being an authority opposed to the above construction of sec. 68 (per Cameron, Fullerton and Dennistoun, JJ.A.).

Judgment of Macdonald, J. [1920] 3 W.W.R. 71, reversed.

ARGUED: 3rd November, 1920.
DECIDED: 29th November, 1920.

Statement.

APPEAL by plaintiff from judgment of Macdonald, J. ([1920] 3 W.W.R. 71) dismissing an action to recover the balance of purchase-price under an agreement of sale. Appeal allowed with costs.

W. P. Fillmore and *R. T. Robinson*, for plaintiff, appellant.

W. L. McLaws and *A. M. Campbell*, for defendant, respondent Clements.

H. A. Bergman, K.C., for defendant, respondent Halldorson.

PERDUE, C.J.M.—This is an action brought to recover purchase-money due under an agreement for sale of land to the

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defendants. The main defence is that the sale in question was not specially authorized by a by-law of the board of directors of the plaintiff company under sec. 68 of *The Companies Act*, R.S.M., 1913, ch. 35. Mr. Justice Macdonald, before whom the case was tried ([1920] 3 W.W.R. 71) held that he was bound by the decision of this Court in *Houghton Land Corpn. v. Ingham*, 24 Man. R. 497, 6 W.W.R. 1275, 28 W.L.R. 826, and he dismissed the action upon that ground. The other defences raised were decided by the trial Judge in the plaintiff's favour. With these I need not deal beyond saying that I approve of the disposition the trial Judge made of them.

At the trial the plaintiff put in evidence an agreement for the sale of the lands in question by the plaintiff to the defendants and for the purchase of the same by the defendants at the prices and on the terms set forth in the document. This agreement was executed by the plaintiff company under its corporate seal, the name of the company and the signatures of its president and one of its directors being placed beside the seal. The agreement was executed under seal by each of the defendants. There was no by-law of the directors of the company produced which specially authorized the agreement under sec. 68 of *The Companies Act*.

In *Houghton Land Corpn. v. Ingham, supra*, the majority of the Court of Appeal refused upon the particular facts of that case to enforce an agreement for sale of land by a land company to a purchaser, there being no by-law of any kind authorizing or enabling the directors to sell. An important element in that case was that the defendant, although he executed the agreement, made no payment of purchase-money and repudiated the agreement within two weeks after signing it and before action was brought upon it.

In the present case the defendants made the first payment and never, so far as the evidence shows, repudiated the agreement. The defendant Clements when about to leave this province a year after the agreement was signed, executed a quit-claim deed and left it in Hansson's office. The latter was the general sales agent of the company. This quit-claim deed was not accepted by the company.

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A person who has not signed an agreement may bring an action to enforce it against another who has signed it. The defendant cannot in such a case object the want of mutuality for want of execution of the agreement by the plaintiff, because the plaintiff would admit the contract by suing on it, and would be bound to perform it as a condition of obtaining specific performance of it. See *Leake on Contracts,* 6th ed., 831-833; *Fry on Specific Performance,* 5th ed., 838, and cases cited by the authors: See also *Montgomery v. Ruppensburg,* 31 O.R. 433. But where the plaintiff is a corporation and the contract is one which requires the corporate seal to bind the plaintiff, and there is not such part-performance as would entitle the defendant to enforce the contract against the plaintiff, then it is not binding on the defendant because the plaintiff was not bound: *Kidderminster Corpn. v. Hardwicke,* L.R. 9 Ex. 13, 43 L.J. Ex. 9; *Oxford Corpn. v. Crow* [1893] 3 Ch. 535, 69 L.T. 228.

In the present case the contract upon its face has been executed by the plaintiff under its corporate seal. The objection of the defendants is that the execution of the document was not authorized under sec. 68 of the Act. The presumption is in favour of legality and of due compliance with all necessary requirements and formalities. The onus is on the defendants to establish their contention.

Amongst the records of the plaintiff company produced at the trial is by-law No. 2 passed at a shareholders' meeting held March 9, 1912. This by-law authorizes the purchase of the tract of land which was afterwards subdivided into town lots, four of which comprise the land mentioned in the agreement in question. The company was in fact primarily formed for the purpose of purchasing and re-selling that subdivision: See minutes of shareholders' meeting of February 15; 1913. The by-law purports to empower the directors to subdivide the land into building lots and to sell them at such price and on such terms as to the directors may seem advisable. It further declares that the directors "may and shall pass and enact from time to time such resolutions and by-laws as may prove necessary to carry out the objects aforesaid."

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The above is a general by-law of the company passed at a meeting of the shareholders and intended to fully authorize the directors to sell its town lots, the acquiring and selling of which was the main, if not only, business in which it was engaged. It is objected by counsel for the defendants that the shareholders cannot initiate and pass a by-law, that the directors must do this, the shareholders having only the power to ratify, amend or reject it. Power is conferred on the directors by sec. 32 of the Act to make by-laws for the various purposes set out in the section. It is not an exclusive power that is conferred by that section. It does not cover the sale of lands, and prior to the enactment of secs. 67 and 68 the directors do not appear to have been specifically authorized to pass a by-law for that purpose. In case of a company, other than a land company, mortgaging its land to secure debentures or other liability of the company the directors' by-law must be confirmed by a meeting of the shareholders.

A meeting of shareholders duly called is a meeting of the company. The directors are the agents of the company appointed by the shareholders. I see no reason why at a regular meeting of the company, shareholders and directors being assembled together, a by-law might not be passed giving authority and instruction to the directors concerning the transaction of an important part of the company's business. It is to be noted that this same by-law, and not a by-law of the directors, authorizes the purchase of the property in question. It is evident that the whole transaction—the purchase of the land, the subdivision into lots and the disposal of them—was laid by the directors before the shareholders at the meeting when the by-law was passed. If it is essential that the directors should initiate the by-law I would be prepared to assume in this case that that had been done and that the re-enactment of it at a shareholders' meeting was the form adopted by the shareholders for ratifying and confirming it.

I think the appeal should be allowed and judgment entered for the amount claimed by the plaintiff together with costs in both Courts. The amount of the judgment should, however, be paid into Court and remain there until the plaintiff shows a clear title to the lands and tenders a sufficient conveyance of

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the same, both to be approved by the Master of the Court. Either party to have liberty to apply.

CAMERON, J.A.—The plaintiff, a land company incorporated under *The Manitoba Joint Stock Companies Act,* R.S.M., 1902, ch. 30, brought this action to recover the sum of $1,513.20 claimed to be due on an indenture whereby the plaintiff agreed to sell and the defendant agreed to buy certain lands therein mentioned at and for the price of $1,200, to be paid, $240 in cash and the balance in sums of $240 on October 12, 1912, April 12, 1913, October 12, 1913, and April 12, 1914, with interest at six per cent. No other payment than the cash payment was made. Amongst the various defences set up to the action it was alleged that the agreement for sale in question was not specially authorized by a by-law passed by the board of directors of the company as required by sec. 68 of *The Companies Act,* ch. 35, R.S.M., 1913, and that, therefore, the alleged contract was null and void.

It was shown at the trial that at a meeting of the directors of the company duly held on April 3, 1912, the secretary submitted a proposed plan of subdivision of the company's property, and it was

> moved and resolved that the new plan be accepted as the official plan of the subdivision, and that the prices be as follows:

Then follow the prices at which the property was to be sold,

> And it is resolved that Skuli Hansson & Co. be and they are hereby authorized and directed to sell said property in accordance herewith on such terms as they may see fit.

The trial Judge held ([1920] 3 W.W.R. 71) that this was a resolution and not a by-law, that it did not conform with the requirements of sec. 68 of *The Companies Act,* that "it shall be sufficient if * * * specially authorized by a by-law passed by the board of directors" and that the case was indistinguishable from *Houghton Land Corpn. v. Ingham,* 24 Man. R. 497, 6 W.W.R. 1275, 28 W.L.R. 826, and dismissed the action. All other defences raised he disposed of in favour of the plaintiff.

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In that case in the judgments of two of the Judges of this Court as it was then constituted (the present Chief Justice and Mr. Justice Haggart) a rigidly restrictive interpretation was given sec. 68. Mr. Justice Richards held that to enable a land company to contract to sell a shareholders' by-law or a by-law under sec. 68 was necessary. On appeal to the Supreme Court (10 W.W.R. 1252) the case was not decided on that point, but on the question of fraud. The Chief Justice of the Supreme Court and Mr. Justice Brodeur (with Mr. Justice Anglin inclined to the same opinion) held that the purpose of the amendment was rather to make valid contracts that were invalid or doubtful than to make invalid that which before the enactment was valid.

In *Quinn v. Leathem* [1901] A.C. 495, at p. 506, 70 L.J. P.C. 76, Lord Halsbury held that every judgment must be read as applicable to the particular facts proved and that "a case is only an authority for what it actually decides." What was actually decided in *Houghton Land Corpn. v. Ingham, supra,* was merely that the defendant was entitled to relief on the ground of fraud and misrepresentation. In such circumstances this Court is not bound by previous expressions of opinion of its members on the construction to be given to sec. 68, and I am at liberty to reaffirm the dissenting opinion I gave in that case. I am unable to see anything in sec. 68 that restricts or abrogates the rights of a land company to dispose of or convey its lands in any manner that would have been sufficient or effective prior to the passage of that section in 1911. I hold the section enabling and directory and not restrictive and exclusive. In this view the allegations setting up sec. 68 as a defence are bad in law.

Whatever may have been the distinctions previously existing between the powers and capacity of corporations at common law and those created under statute, these have been modified by the modern tendency in favour of giving a statutory corporation, as far as possible, the capacity of a natural person. This tendency has been marked in the case of commercial and trading corporations and corporations created for special purposes and is in response to the necessities and demands arising out of the vast increase in their number and the

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multiplicity of their transactions. We have now the statute passed by our Legislature, in 1917, ch. 12, 7 Geo. V. [*An Act respecting the Capacity of Companies*] by which every corporation or company heretofore or hereafter created under *The Companies Act* of Manitoba or by any special Act

shall * * * have and be deemed to have had, from its creation, * * * * the general capacity which the common law ordinarily attaches to corporations incorporated by royal charter under the great seal.

Under the provisions of the general by-laws of the company full provision is made with respect to the duties and powers of the directors, president, secretary-treasurer and other officers of the company. The agreement sued on is executed in accordance with these by-laws and under the provisions of *The Companies Act*, particularly of sec. 66, making binding on the company contracts made on its behalf by its officers or agents in general accordance with their powers as such and of sec. 67 empowering land companies to alienate and convey their real estate, is, in my opinion, valid and binding on the company. I agree with the views expressed by Mr. Justice Dennistoun, whose judgment I have read, on the subject of the validity and effect of these general by-laws. Even without these by-laws, I would be prepared to say that, in the circumstances of this case, the agreement binds the company.

I do not, therefore, need to discuss the resolution of April 3, 1912, authorizing Skuli Hansson & Co. to sell the property of the company including that in the agreement. I may say that it seems to me a sufficient compliance with sec. 68. True the word "resolved" is used, yet this is in substance a by-law for all practical purposes, duly authenticated and within the words and true intent and meaning of sec. 68.

Other grounds in support of the judgment were pressed on the argument, but they do not appeal to me any more than they did to the trial Judge.

I think the appeal must be allowed and judgment entered for the plaintiff for the amount claimed with costs of this appeal and in the King's Bench.

FULLERTON, J. A.—This action was brought to recover the balance due under an agreement for the sale of land made on

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April 12, 1912. The defendants by their pleading raised the point that the plaintiff was a land company and the agreement, not having been specially authorized by a by-law passed by the board of directors as required by sec. 68 of *The Companies Act,* was "null and void and of no effect and never became a contract binding upon this defendant."

The learned trial Judge decided ([1920] 3 W.W.R. 71) the point in favour of the defendant holding the decision of this Court in *Houghton Land Corpn. v. Ingham,* 24 Man. R. 497, 6 W.W.R. 1275, 28 W.L.R. 826, conclusive of the question.

The plaintiff company was incorporated by letters patent pursuant to the provisions of *The Manitoba Joint Stock Companies Act* being ch. 30 of the Revised Statutes of Manitoba, 1902.

Sec. 2 of *The Companies Act,* R.S.M., 1913, ch. 35, provides that,

> This part applies to—
>
> (*b*) all companies incorporated under *The Manitoba Joint Stock Companies Act,* being chapter 30 of the Revised Statutes of Manitoba, 1902, or any Act or Acts for which said Act was substituted.

It is admitted that the plaintiff company is a land company within the meaning of *The Companies Act* and the minute book which was put in evidence shows that the sole object of incorporation was the purchase, subdivision and sale of a block of land which included the lots purchased by the defendants.

At a meeting of the shareholders of the company called for the purpose of organization on March 9, 1912, directors were appointed and general by-laws passed.

The sections of the general by-law which were referred to in the argument are the following:

> Section 3. The affairs of the company shall be managed by a Board of Directors to consist of five persons, each of whom shall be a shareholder in the Company holding at least one share of the capital stock thereof.
>
> Section 7. The directors shall have power—
>
> (2) To appoint and remove for cause all officers, and to appoint and remove at pleasure all agents or employees of the Company, prescribe their duties, fix their compensation.

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(4) To conduct, manage and control the affairs and business of the Company, and to make rules and regulations not inconsistent with the laws of the Province of Manitoba or the by-laws of the Company, for the management of the affairs of the Company.

14. The President shall sign all certificates of stock and all contracts and instruments in writing which have been approved of by the Board of Directors.

18. The Managing Director of the Company shall have general control over the direction of all business and affairs of the Company and shall manage and superintend the same.

19. The President, Vice-President and Secretary-Treasurer or any two of them may make contracts and engagements of any kind on behalf of the Company, subject to the control of the Board of Directors.

At the same meeting of the shareholders on March 9, 1912, by-law No. 2 was passed which, after authorizing the purchase of the lands, in which the lots in question are included, enacts as follows:

And Be it further Enacted that the directors of the company may and do cause to be subdivided into building lots and may and do resell the same at such price and at such terms as to the directors shall from time to time seem advisable, and may and shall pass and enact from time to time such resolutions and by-laws as may prove necessary to carry out the objects aforesaid.

At a meeting of the directors held on March 13, 1912, J. G. Coster was elected president of the company and Skuli Hansson, secretary-treasurer and general manager.

At a meeting of the directors held on March 16, 1912, Skuli Hansson & Co. were appointed selling agents for "South View" (the subdivision in question) and the selling-price of the different blocks in the subdivision was fixed.

At a meeting of the directors held on April 3, 1912, a new plan of subdivision was accepted and new prices fixed. The following resolution was then passed:

That Skuli Hansson & Co. be and they are hereby authorized and directed to sell said property in accordance herewith, on such terms as to them may seem fit.

Acting under the authority of the above resolution Skuli Hansson & Co. sold the lots in question to the defendants, and both the plaintiff and defendants executed the agreement for sale sued on herein. The agreement for sale is under the seal of the plaintiff company and executed by J. G. Coster, the president of the company, and Skuli Hansson, the secretary,

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the officers of the company authorized by sec. 19 of the general by-laws to "make contracts and engagements of any kind on behalf of the Company."

The defence to this action is based on an amendment to sec. 65 of *The Manitoba Joint Stock Companies Act* passed in 1911, now sec. 68 of *The Companies Act*. This section provides as follows:

> Every such land company may mortgage or convey or make an agreement of sale of land without the assent of the shareholders, and it shall be sufficient if each such conveyance, mortgage or agreement be specially authorized by a by-law passed by the board of directors. This provision shall be retroactive and shall apply to all such transactions heretofore entered into by any such land company.

Counsel for the plaintiff contended that the resolution of the directors passed on April 3, 1912, above recited, can be treated as a by-law. It is true that a by-law may be in the form of a resolution. One test is to ascertain whether the company itself has treated it as a by-law. The by-laws of the plaintiff company are recorded by themselves in the minute book, numbered consecutively and are expressly called by-laws. I hold therefore that the resolution in question was not a by-law.

The defendants contend that under *The Companies Act* a by-law of the directors is essential to the validity of an agreement for sale, that in the absence of such a by-law the agreement is not binding on the company, and there being no mutuality the defendant is not bound.

The case of *Houghton Land Corpn. v. Ingham, supra,* a decision of this Court is cited as directly so holding and the headnote to that case supports that position.

I have carefully read the reasons for judgment given by the different Judges who decided that appeal and the conclusion I have arrived at is that the case is not authority for the broad proposition that a company can only authorize a sale of land by a by-law of its directors. The action there, as here, was to recover the amount due on the sale of land to the defendant. No by-law of either the shareholders or the directors, had ever been passed to authorize the sale to the defendant. Two defences were raised: (1) Misrepresentation; (2)

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Want of mutuality. The case was tried by Metcalfe, J. (24 Man. R. 497, 5 W.W.R. 544, 25 W.L.R. 962) who held the defendant had failed in both defences. With regard to the defence of want of mutuality he said:

I do not think the Legislature intended to lay down a hard and fast rule by which a company must alienate its lands; but rather to establish a definite procedure which, if followed, would legalize a transaction. At all events, if there was any such intention it has not been so expressed as to deprive a trading company such as this of its rights to carry on its business according to the law which was in force prior to the passing of the statute.

The appeal was heard by Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. Richards, J.A. at p. 510 (24 Man. R.) said:

I am of opinion, therefore, that, to enable the plaintiffs to agree, or contract, to sell the land here in question, *a shareholders' by-law* or a by-law such as contemplated by section 68 was necessary, and there never has been either.

Perdue, J.A. held that a by-law of the directors was essential to the validity of a sale. At p. 516 (24 Man. R.) he said:

In the present case the objection of want of mutuality seems to me to be fatal to the plaintiff's case. The requirements of the amendment to the statute passed in 1911, and above quoted, are to my mind quite as stringent as the common law necessity for the affixing of its corporate seal by a municipal corporation when entering into a contract. A special by-law to authorize this transaction was required by the statute and none was passed. Without such authority the company was not in a position to contract.

Perdue, J.A. also held that the defence of misrepresentation had been established.

Haggart, J.A. agreed with Perdue, J.A. as to the effect of the amendment. Howell, C.J.M. and Cameron, J.A. dissented. Howell, C.J.M., held that the agreement in this case having been validly entered into prior to the amendment was not rendered invalid by the amendment. He expresses no definite opinion as to the effect of the amendment. All he says on the point is that

perhaps, as to deeds and contracts executed after the passage of the statute, it might be held to be a procedure directed by the Act, but I do not think that the Legislature intended to make invalid that which was before the enactment valid.

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Cameron, J.A. on the other hand held that the procedure provided by the amendment was not exclusive. At p. 523 (24 Man. R.) he says:

> I consider that section 68 merely provides that a by-law authorizing each special transaction shall be a sufficient authority, and that no further evidence than proof of the existence of such a by-law shall be necessary. That is to say, the Legislature indicates one method of procedure which, if adopted, shall be deemed sufficient. But the existing provisions of the law are not annulled or intended to be annulled * * * * * I think the section 68 is directory only and not mandatory, within the rules laid down in well-known cases, and failure to comply with it has not the effect of invalidating transactions perfectly valid under the law as it existed prior to the enactment of this section.

The case was appealed to the Supreme Court, where the decision was upheld on the ground that the misrepresentations proved were such as to render the contract unenforceable: 10 W.W.R. 1252.

The Chief Justice, who dissented, held that the agreement was duly executed and constituted at the time a valid contract and that the amendment of 1911 was not intended to render null contracts already executed.

Brodeur, J., who also dissented, held that the provisions of the amendment were permissive and enabling and not prohibitive.

Anglin, J. who was a party to the judgment, said that he would not be prepared to uphold the judgment on the ground taken by the Court of Appeal for Manitoba. While he expressly states that he does not intend to express a concluded opinion, he says that the statute is in its form curative and permissive rather than restrictive or prohibitive, and that if it was the intention of the Legislature to enact that no contract of a land company for the sale of real estate in which it was dealing should be valid or enforceable unless expressed by a special directors' by-law he would not expect to find that intention expressed in the language used in that statute. The judgments of Davies and Idington, JJ. relate entirely to the question of misrepresentation.

In my view the headnote to *Houghton Land Corpn. v. Ingham* as reported in the Manitoba Reports does not correctly state what the Court decided. Only two Judges—Perdue and

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Haggart, JJ.A.—held that compliance with the amendment is essential to the validity of an agreement for sale. We are therefore, I think, at liberty to consider the effect of the amendment and are in no sense concluded by the authority of that case.

I entirely agree with the view expressed by Cameron, J.A. in *Houghton Land Corpn. v. Ingham,* at p. 523 (24 Man. R.), as to the effect of the amendment.

There is nothing in the amendment to indicate that the method there provided was to be the sole and exclusive method of evidencing the authority of the company as to any particular sale. It merely provided for the future one method which would be sufficient, namely, a by-law of the directors. It does not purport to interfere with the procedure in vogue before the passing of the amendment. If the procedure followed here was sufficient to validate a sale made before 1911, I think it is perfectly good.

Here we have an agreement of sale, under the seal of the company and executed by its president and secretary-treasurer, the latter of whom was at the time the general manager of the company.

Prima facie the company was bound by its contract under seal. While the defendant was fixed with knowledge of the provisions of *The Manitoba Joint Stock Companies Act* and probably of the terms of the letters patent, he was not bound to inquire into the regularity of the internal proceedings, but was entitled to assume that all had been regularly done.

This rule [as stated in *Palmer's Company Law,* 9th ed., 1911, p. 44,] is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. [See *McKnight Construction Co. v. Van Sickler,* 51 S.C.R. 374.]

The plaintiff company was a land company and its sole business was the sale of the lots contained in its subdivision. One would think that a land company stands in the same position as any other trading company and that its general manager alone could make binding contracts for the sale of its land in the same way as the manager of an ordinary trading company can make binding contracts for the sale of its goods.

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In *Houghton Land Corpn. v. Ingham,* 10 W.W.R. 1252, Sir Charles Fitzpatrick, C.J., at p. 1255, speaking of land companies, says:

> These land companies must, I think, be considered as standing in a different position as regards sales of land which is their stock in trade from other companies and persons. It is true, as Richards, J.A. points out, that there are certain necessary differences between sales of land and those of goods, but our ideas concerning the ownership and transfer of land and the rules by which it is governed are those of countries where all available land has been settled for centuries past and companies carrying on such business as land companies in the West could hardly be found in them.
>
> There is no essential difference between the contract for sale and any other. * * *

McKnight Construction Co. v. Van Sickler, supra, was an action to enforce specific performance of a contract entered into on behalf of the company by its secretary-treasurer alone. The company was an ordinary trading company and the sale was of its business premises. Idington, J., who dissented from the judgment of the Court, said at p. 380 (51 S.C.R.):

> If this company had been formed with one of its objects to be the dealing in real estate, then the matter would have been very simple. Either his position as secretary-treasurer or assistant manager of such a corporation might well have implied authority to sell real estate, for that would be its business.

Whether the views above quoted are sound or not, it is unnecessary for us to decide in this case, as we have here express authority conferred by the shareholders on the president and secretary to make all contracts and engagements of any kind on behalf of the company. See general by-law No. 1, sec. 19, quoted above.

The *McKnight Case, supra,* goes much further than is necessary to support the validity of the agreement for sale in this case. The headnote to that case reads as follows:

> Where the contract is executed by an officer of the company to whom the necessary authority might be given the other party thereto is not called upon to ascertain if proper steps had been taken to clothe him with such authority; it is sufficient that he is the apparent agent of the company to transact business of the kind and that the power which he purports to exercise is such as, under the constitution of the company, he might possess.

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In this case the company was not a land company, the contract was not under the seal of the company and was signed only by one Douglass, who was secretary-treasurer and assistant general manager.

In the case at bar the contract is under the seal of the company, and is signed by the president and secretary-treasurer who was also the general manager.

Apart from other considerations I think the objection of want of mutuality is overcome by the institution of the action itself. The directors at a meeting held on May 6, 1919, authorized the bringing of the action.

In *Dowell v. Dew,* 1 Y. & Coll. C.C. 345, 12 L.J. Ch. 158, it was held that in order to establish the validity of an agreement in a Court of equity it is not necessary to show that it was binding on both parties at the time of its being signed; it is sufficient if an agreement signed by one party be afterwards accepted and acted on by the other.

In *Fry on Specific Performance,* 5th ed., at pp. 236-237, the law is stated as follows:

> Mutuality may be waived by the subsequent conduct of the person against whom it could not originally have been enforced * * * * Where, from the relation of the parties to one another, the contract is originally binding on the one and not on the other, the latter may by action waive the want of mutuality, and enforce the specific performance of the contract; as in the case of an action by a *cestui que trust* against his trustee for the performance of a contract for sale, such a contract being originally binding on the trustee, and not on the beneficiary.

I would allow the appeal.

DENNISTOUN, J.A.—The plaintiff company is incorporated as a land company under *The Manitoba Joint Stock Companies Act,* R.S.M., 1902, ch. 30 [now *The Companies Act,* R.S.M., 1913, ch. 35]. By sec. 67 of the Act, a land company is one which is incorporated for the purpose of buying and selling land and is authorized to acquire, hold, alienate and convey real estate in addition to any real estate requisite for the business of the company.

The company acquired a large parcel of land in the vicinity of the city of Winnipeg, which it subdivided into building lots and offered for sale at prices fixed by the board of directors.

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On April 12, 1912, an agreement of sale was executed by the company as vendor and by the defendants as purchasers.

This agreement is unexceptionable as to form. It is signed on behalf of the company by the president and a director who was also secretary and the corporate seal is affixed thereto. The defendants signed and sealed the document on their part, and paid the sum of $240 as part of the purchase-price. Nothing further has been paid, and on August 28, 1919, action was entered to recover $1,513.20 and interest. The learned trial Judge dismissed the action ([1920] 3 W.W.R. 71) upon the ground that there is no by-law of the directors specifically dealing with this sale, being under the impression that he was bound to do so under the authority of a judgment of this Court in *Houghton Land Corpn. v. Ingham,* 24 Man. R. 497, 6 W.W.R. 1275, 28 W.L.R. 826.

A close examination of the reasons for judgment in that case delivered by the majority of this Court (Richards, Perdue, and Haggart, JJ.A.) discloses that Perdue and Haggart, JJ.A. were of opinion that a directors' by-law was necessary under sec. 68 of *The Companies Act,* but that Richards, J.A. considered a by-law of either the shareholders or directors sufficient. Howell, C.J.M. and Cameron, J.A. dissented.

In the case at bar there is a shareholders' by-law which authorizes the subdivision and sale of the lands in question which the late Mr. Justice Richards might have considered sufficient. In the Supreme Court of Canada the point was not decided as the appeal was dismissed on the ground of misrepresentation and not on the ground of want of mutuality. Fitzpatrick, C.J., Anglin and Brodeur, JJ. intimate their non-concurrence with the view taken by the majority of this Court concurring with the views of Howell, C.J.M. and Cameron, J.A. that sec. 68 of the Act was enabling and permissive rather than prohibitory and restrictive. It was intended to make valid what may have been invalid, not to make invalid what was previously valid. 10 W.W.R. 1252.

In view of the diversity of opinion which prevailed not only in this Court but in the Supreme Court of Canada, *Houghton Land Corpn. v. Ingham, supra,* can only be regarded as de-

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termining the facts which were in issue in that case and not as an authority governing general principles as to the requisites of contracts for the sale of land by land companies.

Lord Halsbury says in *Quinn v. Leathem* [1901] A.C. 495, at p. 506, 70 L.J.P.C. 76:

> Now, before discussing the case of *Allen v. Flood*, [1898] A.C. 1, 67 L.J.Q.B. 119, and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

Houghton Land Corpn. v. Ingham, supra, in my humble opinion, is only an authority for the dismissal of an action upon a contract on the ground of misrepresentation as found by the Supreme Court, or for want of mutuality as found by the Court of Appeal.

It is now necessary to consider the validity of the contract sued on and the weight to be given to the defence raised that it is unenforceable by reason of the absence of a by-law of the directors specially authorizing the agreement of sale in accordance with the provisions of sec. 68 of *The Companies Act,* which reads as follows: [See *ante,* p. 582.]

This section was introduced into *The Companies Act* by the amending Act of 1911, which also introduced sections restricting the charging, hypothecating, mortgaging or pledging of the company's real or personal property (other than the property of a land company) except under authority of a directors' by-law confirmed by a vote of not less than two-thirds in value of the shareholders.

Land companies were specifically excepted from these restrictions, and, in my opinion, sec. 68 was not intended to make new law, but to provide an easy method of establishing and assuring the validity of a sale by a land company either in a land titles office, or to a purchaser, or otherwise, in the event of doubt being raised in respect to the transaction.

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Had the Legislature intended to alter the law and make invalid a sale under the hand of the principal officers of the company and the corporate seal, such sale being made in the ordinary course of business of a company dealing in land, it would have said so in clear and unmistakeable terms.

In *McKnight Construction Co. v. Van Sickler,* 51 S.C.R. 374, at p. 380, Idington, J. dealing with an agreement to sell land signed by the secretary-treasurer of a company without the corporate seal or by-law authorizing the transaction, says:

> If this company had been formed with one of its objects to be the dealing in real estate, then the matter would have been very simple. Either his position as secretary-treasurer or assistant manager of such a corporation might well have implied authority to sell real estate, for that would be its business.

Sir Charles Fitzpatrick, C.J. in his reasons for judgment in *Houghton Land Corpn. v. Ingham,* 10 W.W.R. 1252, at p. 1254, deals with the identical point under consideration in the case at bar. He puts it in this way:

> It seems unnecessary to refer to authorities to show that all corporate bodies are *prima facie* bound by contracts under their common seal. It is not, however, really open to dispute that this agreement was duly executed *and constituted at the time a valid contract.* In saying this I must point out that we have the advantage which the Court of Appeal had not of seeing the letters patent of incorporation of the appellant company. It is of course plain from these that the whole purpose and object of the company was the buying and selling of land, and dealing in real estate as a business or trade. These land companies must, I think, be considered as standing in a different position as regards sales of land which is their stock-in-trade from other companies and persons.

The learned Chief Justice then proceeds to discuss sec. 68 of *The Companies Act* in order to ascertain if it had rendered invalid a contract which prior to the passing of the Act was valid and binding. Although the provisions of the section are declared to be retroactive he came to the conclusion in agreement with Howell, C.J.M., in the Court of Appeal that the purpose of the section

> must have been rather to make valid contracts which were invalid or doubtful, than to make invalid that which before the enactment was valid.

Anglin, J. at p. 1259, while not desiring to express a concluded opinion on the point as he preferred to base his judgment on the ground of misrepresentation, says:

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If it was the intention of the legislature to enact that no contract of a land company for the sale of real estate in which it was dealing should be valid or enforceable unless authorized by a special directors' by-law, I certainly should not expect to find that intention expressed in the language used in the statute before us. That statute is in its form curative and permissive rather than restrictive or prohibitive.

Brodeur, J., at p. 1261, says:

The provisions are permissive and enabling and not prohibitive. Any other construction which would be made upon that statute would have the effect of invalidating a very large number of transactions, which would make it almost impossible for any land company to maintain any contract.

I agree with the view of my brother Cameron in *Houghton Land Corpn. v. Ingham, supra,* at p. 523 (24 Man. R) to the effect that

section 68 merely provides that a by-law authorizing each special transaction shall be a sufficient authority, and that no further evidence than proof of the existence of such a by-law shall be necessary. That is to say, the Legislature indicates one method of procedure which, if adopted, shall be deemed sufficient. But the existing provisions of the law are not annulled or intended to be annulled. If such had been the intention of the Legislature, that intention would surely have been made manifest beyond question. All other methods would, in that case, have been expressly prohibited, or all transactions in contravention of section 68 would have been declared invalid. But it is not so enacted.

In addition to the production of the agreement of sale under the hand of the principal officers of the company and the corporate seal we have the provisions of sec. 66 of *The Companies Act* that every contract or agreement made on behalf of the company by any officer of the company in general accordance with his powers as such officer under the by-laws of the company or otherwise, shall be binding upon the company, and in no case shall it be necessary to have the seal of the company affixed to any such contract or agreement, or to prove that the same was made in pursuance of any by-law.

There are also by-laws passed by the shareholders on March 9, 1912, at what was apparently the organization meeting of the company. These are recited to be "by-laws for the regulation of the management of the business of the St. Vital Investments Ltd. of Winnipeg." They make provision for the election by the directors of the principal officers of the company—president, vice-president, secretary, treasurer and managing director—and assign their duties. The secretary is

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made custodian of the corporate seal and authorized to affix it to all instruments requiring a seal: By-law 18(3). The president, vice-president and secretary-treasurer or any two of them may make contracts and engagements of any kind on behalf of the company, subject to the control of the directors.

It is objected that the directors alone have power to initiate by-laws and that the shareholders are restricted to powers of confirmation, repeal and amendment. Sec. 32, and subsections of *The Companies Act.*

I agree with the learned author of *Mitchell's Canadian Commercial Corporations,* at p. 934, that although under the letters patent Acts, no express power is given to the shareholders to initiate and enact by-laws, no such power is necessary, as by common law the right of enacting by-laws resides in the shareholders at large and not in the directors, and they can only be deprived of this right by statute, either by express terms or by implication.

That the statute has deprived the shareholders of this right in many cases is undoubted. See sec. 24 and sec. 32 of *The Companies Act;* and *Colonial Assur. Co. v. Smith,* 22 Man. R. 441, 2 W.W.R. 699, 21 W.L.R. 815; *Kelly v. Electrical Construction Co.,* 16 O.L.R. 232; *Rex v. Westward,* 7 Bing. 1, 2 Dow. & Clark 21, 4 Bligh. (N.S.) 213; *Stephenson v. Vokes,* 27 O.R. 691, at p. 696; *Beaudry v. Reed,* 10 O.W.R. 622, at p. 625, and many other similar cases.

But when I find the general by-laws of a company—the *de facto* by-laws—which have been acted upon from the inception of the company eight years ago until the present by shareholders and directors alike, I am prepared to assume that they were regularly passed, without requiring formal proof to be given that they were initiated by the directors and confirmed by the shareholders, there being no contest between shareholders and directors as to their validity.

The shareholders at this first meeting passed another by-law numbered 2, which authorizes the purchase of the property in question, its subdivision into building lots and sale. The purchase of this property and its re-sale apparently comprised the whole undertaking of the company. This by-law determined

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the policy and character of the business to be undertaken. It was intended to confine the operations of the business to town lots to the exclusion of farm lands. To my mind it was within the general common-law powers of the shareholders to pass and did not in any way detract from the powers of the directors to manage and administer the affairs of the company. In any event the directors raised no question. They acted upon the by-law, bought the property, subdivided it and sold part of it to the defendants.

Moreover the directors passed resolutions directing how the property should be subdivided, the prices to be charged for lots, and appointed a selling agent to carry their directions into effect.

To my mind this company was most effectually bound by the contract in question and there can be no escape for the defendants on the ground of want of mutuality, and for the reasons stated no by-law of the directors under sec. 68 was necessary.

I do not consider it necessary to deal with the carefully prepared and presented arguments of Mr. McLaws and Mr. Bergman with regard to the delegation by the directors to Skuli Hansson & Co., selling agents, of power to fix the terms of sale other than the price. In view of the adoption of the terms by the concluded agreement any force which might otherwise lie behind this contention is expended. The agreement is itself conclusive and binds both the vendor and the purchasers.

I would allow the appeal on the terms indicated by the Chief Justice.

Appeal allowed with costs.

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COURT OF APPEAL

ALLEN *v.* STANDARD TRUSTS COMPANY

Before PERDUE, C.J.M., CAMERON and DENNISTOUN, JJ.A.

Private International Law—Companies—Shareholder in Foreign Company—Liability under Foreign Law—Submission to Foreign Jurisdiction—Recovery in Courts Here.

Statutes—Foreign Statute — Construction by Foreign Courts—Construction Imposing Double Liability on Shareholders in Company.

Evidence—Proof of Foreign Law—Proof of Foreign Recorded Documents—The Manitoba Evidence Act.

If one domiciled in Manitoba, a British subject, applies and pays for and receives in Manitoba a certificate for shares in a Minnesota company expressed in his certificate to be "incorporated under the laws of Minnesota" and whose incorporation is expressed in its certificate of incorporation to be under and pursuant to the laws of Minnesota, the shareholder thereby becomes subject to liabilities imposed by the laws of Minnesota on shareholders in the company, such as a double liability assessable in favour of creditors, and also is deemed to have submitted himself in common with all other shareholders to the jurisdiction of the Minnesota Courts and to be found in their process, under the law of their jurisdiction, for the relief of creditors of the company, and he may be sued in Manitoba for the amount of such liability fixed under such process.

In such an action in Manitoba the Courts are bound to accept the construction given to a Minnesota statute by the Minnesota Courts or the Courts by whose decisions the Minnesota Courts are bound.

Applying such construction, it was held that a provision that "Each stockholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him," imposed a double liability.

Manner of proof of Minnesota law considered, and *The Manitoba Evidence Act*, sec. 32, applied.

Documents relating to the incorporation of a Minnesota company were held to have been sufficiently proved by copies certified to by the Minnesota Secretary of State under the Great Seal and by copies certified to by the county register of deeds under his official seal, together with the oral testimony of one who had compared the copies with the originals on record.

The Manitoba Evidence Act does not displace or supersede the Act 14 & 15 Vict., ch. 99 (Imp.); said Acts are cumulative; especially in view of sec. 33 of *The Manitoba Evidence Act*.

Judgment of Galt, J. sustained.

ARGUED: 10th November, 1920.

DECIDED: 29th November, 1920.

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Statement.

Appeal by defendants from the judgment of Galt, J. in an action by the receiver of the O. W. Kerr Co. a Minnesota corporation, against the executors of the estate of Sir William Whyte, deceased, to recover the sum of $5,000, as owing under a double liability assessment, being the amount of the par value of 50 preferred shares held in said corporation, and interest thereon. Appeal dismissed with costs.

15th November, 1919.

GALT, J.—The plaintiff sues as receiver of the O. W. Kerr Co., a foreign company incorporated in the state of Minnesota, with its head office in Minneapolis, doing business as vendors and purchasers of real estate.

The defendants are sued as the executors of the estate of the late Sir William Whyte.

The relief claimed is $5,000, being the par value of 50 preferred shares held by the late Sir William Whyte, with interest at six per cent.

The plaintiff in his statement of claim, has set forth very fully the facts on which he relies, including the laws of Minnesota applicable to the status and liabilities of shareholders in a Minnesota corporation.

The basis of the claim consists in a double liability, alleged to attach in favour of creditors to every share of stock issued by a corporation which has become insolvent.

The plaintiff is a practising attorney in Minnesota, and gave expert evidence as to the laws of that state applicable to the case. The statutes of Minnesota and many decisions thereon were also produced and referred to in confirmation of the plaintiff's evidence.

The statement of defence consists almost wholly of specific denials.

The substantial allegations in the defence are: (a) That the late Sir William Whyte had for 20 years past been domiciled in Manitoba and was not subject to the laws of Minnesota, nor had the plaintiff any cause of action against the defendant in Minnesota; (b) That the defendant is not a share-

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holder in the O. W. Kerr Co.; (c) That the defendant was not a party to the proceedings in which the plaintiff was appointed receiver; (d) That the liability in question is penal and therefore not enforceable in Manitoba.

The case was conducted with great ability by counsel on both sides and it presents some important and intricate features.

I will first refer to the law applicable to the questions in dispute: Under the principles of international law, a contract made in one country is often, by the comity of nations, enforceable in other countries. The essential validity of a contract (as distinguished from its formal validity) as well as its interpretation and effect, and the rights and obligations of the parties to it, are governed (with certain exceptions) by the law which the parties have agreed or intended shall govern it, or which they may be presumed to have intended. This law is generally known as the proper law of the contract. See 6 *Halsbury's Laws of England,* sec. 356.

> Contracts, whatever their proper law, are illegal in England if contrary to English ideas of public policy or morality, or even if any part of them is so contrary. * * *
>
> But a contract good by its proper law, though invalid in England, will nevertheless be enforced in England, if not inconsistent with public order or good morals. [6 *Halsbury,* sec. 363.]

The position of a British or Canadian shareholder in a foreign company has been dealt with in several well-recognized authorities.

In *Copin v. Adamson,* L.R. 9 Ex. 345, 43 L.J. Ex. 161, an action was brought in England on a French judgment. The defendant pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the Court, or subject to French law; that he was never served with any process; nor had any notice or opportunity of defending himself.

The plaintiff filed two replications: (1) Alleging

> that the defendant was holder of shares in a French company, having its legal domicil in Paris, and became thereby subject by the law of France, to all the liabilities belonging to holders of shares, and, in particular, to the conditions contained in the statutes or articles of association; and that

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by these statutes it was provided and agreed * * * [stating certain provisions as to service of process on shareholders, and compliance therewith by the company or its assignee];

(2) A similar replication, but omitting all reference to the statutes or articles of association.

On demurrer it was held by the Court of Exchequer that the first replication was good but the second was bad. In the present case it is argued for the defendants that they are in the same position as the defendants in *Copin v. Adamson, supra,* were under the facts set out in the above second replication. The allegations in the statement of claim appear to sufficiently bring the present case within the first replication in *Copin v. Adamson, supra,* but that case was decided on demurrer whereas the question here is whether the evidence at the trial sufficiently establishes the plaintiff's claim.

In *Emanuel v. Symon,* [1908] 1 K.B. 302, 77 L.J.K.B. 180, Lord Justice Kennedy says, at p. 314, that *Copin v. Adamson, supra,* is an express decision that a subject of Great Britain does not by the mere fact of becoming a shareholder in a foreign company submit himself necessarily to the jurisdiction of the foreign Courts.

Copin v. Adamson was taken to the Court of Appeal only in respect to the first replication (1 Ex. D. 17, 45 L.J. Ex. 15). Lord Chancellor Cairns in giving judgment dismissing the appeal says at p. 19 (1 Ex. D.):

> The replication goes on to represent that, by the law of France, a person taking shares and becoming an *actionnaire* in the company, was bound by all the statutes and provisions of the company. The question might arise, whether, without any express averment, by the law of France as by that of every civilized country, the shareholder would not be bound by all the statutes and provisions of the company in which he was a shareholder. But that question does not arise here, and I say nothing further about it. The averment is, that by the law of France he was bound by all the statutes and provisions of the company. The Court of Exchequer has held that a good replication. I am clearly of the same opinion.

In the *Bank of Australasia v. Harding,* 9 C.B. 661, 19 L.J. C.P. 345, 14 Jur. 1094, the following points were decided on demurrer to the declaration: (a) The members resident in England of a company formed for the purpose of carrying on a business in a place out of England are bound in respect of

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the transactions of that company by the law of the country in which the business is carried on accordingly; (b) A statute authorizing an unincorporated company to sue and be sued in the name of its chairman constitutes the chairman, when so suing or so sued, an agent for the members of the company in the affairs of the company; (c) The members of a company formed for the purpose of carrying on business in a colony are not discharged from liability on judgments obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, and having received no notice of the proceedings; (d) Where a statute subjects the property of a member for the time being of an unincorporated company, to execution upon a judgment obtained against their chairman, reserving in other respects the liabilities of parties, the remedies given against the property are in cumulation, and a member may be proceeded against by action; (e) A judgment in a colonial Court is no estoppel; nor is it pleadable in bar in an action brought in England for the same cause.

Wilde, C.J., in delivering judgment, says at p. 685 (9 C.B.);

The objection to the declaration is to the first count. That count states that the defendant was a member of a banking company acting under a colonial statute; a statute which may be assumed to have been obtained at the request of the parties. It provides, that one member holding a principal office in the company, may sue and be sued, instead of the whole body; and that execution may issue against the property of the other members of that body. But, while giving this benefit to the company, the act provides that it shall not vary the rights or the liabilities of the parties. Now, independently of the colonial act, the defendant would have been liable in respect of the demand for which the defendant is now sued; and, if the judgment had been recovered in an action brought against all the members jointly, an action of debt or *assumpsit* would clearly have lain against the defendant upon that judgment.

The first objection taken to the count is, that the remedy given by the colonial act upon the judgment, is not against the person of the shareholder, but it is limited to execution against the goods of those who are partners at the time the execution issues. I think this is not so; but that the effect of the colonial act is to extend the effect of the judgment. The first count of the declaration shows, that, under the colonial act, all previous rights and liabilities of the parties were reserved. These are sufficient to bind the defendant.

Cresswell, J. says, at p. 687 (9 C.B.):

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I am of opinion that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a company who must be taken to have been a consenting party to the passing of the colonial act. He must, therefore, be regarded as having agreed that suits upon contracts entered into by the company, might be brought against the chairman, and that the chairman should for all purposes represent him in such actions. Being his own appointed agent, he had notice of the proceedings. If he had been resident in the colony, he could not have made himself party to the action, or in any manner personally interfered in the proceedings.

The 5th section of the act extends the remedy by execution to new shareholders who, but for this enactment, would not have been liable upon contracts to which they were not originally parties.

Talfourd, J. says at p. 688 (9 C.B.):

The second question is, whether the fourth plea presents any answer to the cause of action set forth in the first count. That plea states that the defendant was never resident in New South Wales, and had no notice of the proceedings. The answer to that is that the defendant was a member of a partnership carrying on business in the colonies, and was contented to leave his property there to be regulated by the law of the colony.

The present case has been argued on behalf of the defendants mainly upon the ground that the plaintiff is seeking to enforce against the defendants a personal judgment obtained in Minnesota against the late Sir William Whyte, a non-resident and without notice. But the action is not in truth upon any such judgment, nor is it true that the proceedings in Minnesota which resulted in the appointment of the plaintiff as receiver and the assessment levied upon all the shareholders were carried on without notice to the defendants.

Mr. William Harvey, manager of the defendant company, was called as a witness before me and amongst the documents produced by him were the following:

(1) A notice from R. H. Owne, president of the O. W. Kerr Co., to the stockholders of the company, dated January 28, 1915, reciting that the company was in financial difficulties and the claims of its creditors were being pressed by suit and otherwise and giving notice of a special meeting of the holders of common and preferred stock to be held at Minneapolis on February 3, 1915, for the purpose of bringing before stockholders of said company its present acute financial condition and making such arrangement with reference thereto as might

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be deemed advisable or necessary and adding, "It is of the highest importance that you be present at said meeting."

(2) A copy of an order made by Horace D. Dickenson, District Judge, dated at Minneapolis January 24, 1916, in an action brought by Thomas Hallaway, plaintiff, against The O. W. Kerr Company, defendant, whereby it was ordered

that a petition of Edmund P. Allen, as receiver of the above-named defendant company, be heard at a special term of said Court to be held at the Court House in the City of Minneapolis on Saturday, the 11th day of March, 1916, at the hour of 10.00 a.m. at which time after proof of due service of this order the Court will receive and consider such proof by affidavit or otherwise as may be presented or offered on said petition or in relation to the matter therein contained by or on behalf of the said receiver, or any creditor, officer or stockholder of said corporation or any person interested therein appearing in person or by attorney, and particularly upon the following points: 1. The nature and probable extent of the indebtedness of the said defendant corporation. 2. The probable expenses of the receivership. 3. The probable amount of the available assets. 4. The parties liable as stockholders, the nature and extent of the liability of each and their probable solvency or insolvency.

And it is further ordered that the said receiver give notice of such hearing by causing a copy of this order to be published once each week for four successive weeks in the Minneapolis Tribune, a daily newspaper printed and published in the said Hennepin County, and by causing a copy of this order to be mailed to each of the stockholders of the said defendant corporation whose post office address is known to the said receiver or his attorneys at least thirty days prior to the date of said hearing.

(3) Copy of order made by W. E. Hale, District Judge, on April 1, 1916, in the said suit of *Hallaway v. O. W. Kerr Co.* This order contains a very full recital of the proceedings by Edmund P. Allen as receiver of the defendant corporation for an assessment upon the shareholders of the corporation and the appearance of several stockholders thereupon who moved to dismiss the petition upon the ground that the said Court had no jurisdiction to make any order of assessment or any order for the purpose of enforcing the double liability against the stockholders of the said O. W. Kerr Company:

and that by order of 13th March, 1915, the said Edmund P. Allen was appointed receiver with all the usual powers of a receiver of said court; and that all the assets of said defendant corporation were by the said order sequestered; and that the receiver had given the requisite security; and that the plaintiff had recovered judgment for $1,446.04, and that the defendant corporation is insolvent, and it further appearing that the constitutional liability of the stockholders of the said corporation exists and

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that it is necessary to resort to the same; it was ordered that an assessment equal to the par value of each share of the capital stock of the said defendant corporation, to wit, the sum of $100 on each and every share of said capital stock be and the same is hereby assessed upon and against each and every share of the said capital stock and upon and against the persons or parties liable as stockholders of the said defendant corporation and that each and every person or party liable as such stockholders do pay to the said Edmund P. Allen as receiver the said liability within thirty days from the date of this order and that the said receiver forthwith proceed to collect the several amounts due from the several persons or parties liable as stockholders of the said defendant corporation under the terms of this order, and that in case any person liable as a stockholder should fail to pay the amount assessed within the time limited the receiver is authorised to institute and prosecute such action or actions at law or in equity or other proceedings in any court having jurisdiction whether in the state of Minnesota or elsewhere, which said receiver may deem necessary, &c., and it is further ordered that the said receiver give notice of this order by mailing a copy of the same within five days from the date hereof to each stockholder of the said defendant corporation whose name and address is known to the said receiver or to his attorneys or either of them.

Mr. Harvey admitted that these documents were received at the office of the defendant company at about their dates; but that the defendants ignored the demands made by the receiver for payment.

As a general rule, when a judgment is entered, the original cause of action merges in the judgment.

But this is not necessarily so with regard to foreign judgments (See *Bank of Australia v. Harding, supra*). The order of assessment in the present case does not appear to be recognized as a judgment even in Minnesota, for the order itself authorizes the receiver to prosecute actions at law or in equity against any defaulting shareholders, a provision which would be absurd if the order itself operated as judgment.

The liability sought to be enforced against the estate of the late Sir William Whyte is a constitutional liability, expressed in the statutes as follows:

> Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him. [See Revised Statutes of Minnesota, 1905, p. 1186].

This law is still in force as appears from the Revised Statutes of 1913 and by oral expert evidence. The construction placed upon this provision by the Supreme Court of the

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United States, and now applied by the Courts in Minnesota, is that it is a provision intended to protect the creditors of companies and that it imposes upon all shareholders a liability over and above any balance remaining due upon their shares, to the full extent of the par value of their shares. It operates as a double liability.

The wording of the section does not clearly to my mind express a double liability. We have in Canada a liability of this kind in *The Bank Act*, 3 & 4 Geo. V., ch. 9. It is expressed in our statutes as follows:

> In the event of the property and assets of the bank being insufficient to pay its debts and liabilities, each shareholder of the bank shall be liable for the deficiency, to an amount equal to the par value of the shares held by him, in addition to any amount not paid up on such shares.

But if the law of Minnesota be taken to be the proper law of the contract, the interpretation of it cannot depend upon the view taken of it by any particular Judge or Court here in Manitoba. This point came before the Court of Queen's Bench in England in the *Baron De Bode's Case* (1844) 8 Q.B. 208, 10 Jur. 217.

Lord Denman, C.J., says, at p. 250 (8 Q.B.):

> The witness, upon being questioned as to the state of law in France in 1789, refers to a decree of that date. The form of the question is, I think, immaterial: in effect, the witness is asked to speak to the decree. It is objected that this is a violation of the general principle, that the contents of a written instrument can be shown only by producing the instrument or accounting for the non-production. But there is another general rule: that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men: and I think it is not confined to un-written law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law: the witness is called upon to state what law does result from the instrument.

Mr. Justice Coleridge says, at p. 265 (8 Q.B.):

> What in truth is it that we ask the witness? Not to tell us what the written law states, but, generally what the law is. The question is not as to the language of the written law * * *. The question for us is, not what the language of the written law is, but what the law is altogether as shown by exposition, interpretation and adjudication.

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To the same effect were the opinions expressed by the Law Lords in the *Sussex Peerage Case* (1844) 11 Cl. & F. 85, at pp. 114-117, 8 Jur. 793.

These two decisions are quoted in the last edition of *Westlake's Private International Law* as being still leading authorities on the subject.

In the present case Mr. Allen, a competent expert on the law of Minnesota, testified as to what that law was, and his evidence was not shaken by cross-examination. I therefore feel bound to accept such evidence as accurate.

It is true that stockholders in any companies organized for the purpose of carrying on any kind of manufacturing or mechanical business are excepted from the double liability; and Mr. Williams points out that under the powers conferred upon the company by its certificate of incorporation the company has power amongst other things, to sell and dispose of grist-mills, flour-mills, &c., and to do and perform all things necessary in connection therewith; but Mr. Morphy on behalf of the plaintiff, showed very clearly that this exception is confined in Minnesota to companies *exclusively* carrying on a manufacturing or mechanical business, which cannot be said of the O. W. Kerr Company.

My findings upon the evidence are as follows:

1. That the O. W. Kerr Company was duly incorporated in the state of Minnesota as set forth in the statement of claim in the year 1907. The certificate of incorporation provides that

> The undersigned agree to and do hereby associate themselves as a body corporate for the purposes hereinafter expressed, and do hereby, under and pursuant to the laws of the State of Minnesota incorporate ourselves and our successors, and to that end we hereby adopt and sign the following certificate of incorporation.

2. That on or about January 25, 1911, William Whyte (afterwards Sir William Whyte) purchased 50 shares of the preferred stock of the O. W. Kerr Company through Mr. William Harvey then acting as the company's agent for the purpose in Winnipeg; and that William Whyte thereby became a preferred shareholder, and received from time to time divi-

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dends on his shares from the company. See Whyte's certificate of shares (Ex. 13) and Exs. 17 to 24 inclusive.

3. That Sir William Whyte was a British subject and a non-resident of Minnesota, and he purchased the shares in question in Winnipeg; but, in my opinion, the proper law of the contract in question, in so far as the rights and liabilities of the late Sir William Whyte are concerned, is the law of Minnesota.

4. That the laws of Minnesota applicable to the questions in dispute are set forth with substantial accuracy in the statement of claim, save and except the allegations in par. 11 and possibly elsewhere, to the effect that, even in cases where the proceedings were taken in Minnesota against non-resident persons, or without notice to the defendant, relief may be legally recovered by judgment in Minnesota. Such a provision, in the absence of agreement by such individuals, would, in my opinion, be contrary to British ideas of public policy, and as such not enforceable here.

5. That this action is not open to the objection that it is a penal action and therefore unenforceable in Manitoba. The test to be applied in deciding the point is to ascertain whether the proceeding or proceedings in Minnesota were in the nature of a suit in favour of the state, whose law had been infringed. See *Huntington v. Attrill* [1893] A.C. 150, at p. 157, 62 L.J.P.C. 44. I consider the liability in question as merely a civil remedy not enforceable by the state of Minnesota at all.

6. Finally, I find that when Sir William Whyte became a shareholder of the O. W. Kerr Company in the year 1911, he agreed by implication that his rights, liabilities and status as a shareholder in that company should be governed by the laws of Minnesota, and that under these laws the defendant company, as executors of the estate of Sir William Whyte, are now liable for the relief claimed (See *Pickles v. China Mutual Insur. Co.*, 47 S.C.R. 429), together with interest at six per cent in accordance with the law of Minnesota; 6 *Halsbury.* sec. 367.

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I therefore give judgment in favour of the plaintiff for the sum of $5,000 with interest at six per cent as claimed and the costs of the action.

The defendant appealed.

E. K. Williams, for defendant, appellant.

A. C. Ferguson and *E. H. Morphy* (Minnesota) for plaintiff, respondent.

PERDUE, C.J.M.—The plaintiff in this case is the receiver of "The O. W. Kerr Company" a corporation created under the laws of the State of Minnesota. The defendant is the executor of the late Sir William Whyte, deceased. In January, 1911, the deceased became the owner of 50 shares of the preferred stock of the corporation of the aggregate par value of $5,000. The manner in which the shares of the corporation were sold in Manitoba was as follows: The agent to make these sales was furnished with stock certificates executed in blank under the seal of the corporation. When a sale was made and the purchase-money was received, the name of the purchaser and the number of shares were written in the blank spaces in the certificate and the certificate was delivered to the purchaser. The money was remitted to the corporation and the purchaser's name was entered in the books of the corporation as that of a shareholder. The evidence shows that this was the procedure followed in the present case. The deceased was received as a shareholder and dividends were paid to him on his shares from time to time. He was still the owner of these shares when he died in April, 1914. At the time he acquired these shares, and up to the time of his death, Sir William Whyte was domiciled in Manitoba.

By the constitution and laws of Minnesota, each stockholder in a corporation, whether he is the holder of common or preferred shares, shall, with certain exceptions, which do not include the O. W. Kerr Co., "be liable to the amount of stock held or owned by him." The further allegations in the statement of claim are to the effect that the O. W. Kerr Company's financial affairs were in such a condition in the early part of the year 1915 that on the application of a creditor the plaintiff

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was appointed as receiver of that corporation: that the corporation is indebted to various persons, firms and corporations to an amount exceeding $400,000: that it has no assets except the "superadded or constitutional liability of the stockholders."

I think it was sufficiently proved that the deceased had subscribed for and become the owner of the shares in question. The plaintiff, who is a practising attorney-at-law in the State of Minnesota, gave evidence as to facts of importance in the case and also proved the laws of that State applicable to the matters in question. The procedure relating to the appointment of a receiver and the proceedings instituted and completed thereunder were proved by certified copies under the seal of the Minnesota Court and were further identified by the evidence of Mr. Allen. The sufficiency of the proof of the legal proceedings and of the various documents relating to the formation, business and affairs of the company, as put in evidence, are fully dealt with by my brother Cameron in whose conclusions I agree.

The stock certificate delivered to Sir William Whyte when he purchased the shares shows on its face that the company was incorporated under the laws of Minnesota. The letter written to him on January 3, 1911, by the agent of the company suggesting that he should make the purchase, mentions it as "The O. W. Kerr Company of Minneapolis." The letter from Sir William in reply refers to it in the same terms and expresses a willingness to take $3,000 worth of stock. On January 24, 1911, he wrote again and said:

> I have your letter of 21st inst., in connection with increasing the capital stock of the O. W. Kerr Company, of Minneapolis. From my knowledge of this firm's methods, and your own strong recommendation, I will take $5,000 preferred stock, and enclose herewith my cheque for same.

By the word "firm" the writer no doubt meant "company." He must be taken to have intended to become a shareholder in the company with all the benefits and all the obligations attached to the ownership of such shares.

Copin v. Adamson, L.R. 9 Ex. 345, 43 L.J. Ex. 161, is a leading case on the liability of a person who becomes a shareholder in a foreign corporation. That action was brought on

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a French judgment. The defendant pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the Court, or subject to French law, that he was never served with process, nor had any notice or opportunity of defending himself. The first replication to this plea alleged that defendant was the holder of shares in a French company, having its legal domicile at Paris, and that he became thereby subject to all the liabilities, etc., belonging to holders of shares, and in particular to the conditions contained in the statutes or articles of association; that by these statutes it was provided that disputes arising during liquidation should be submitted to the jurisdiction of the French Court; that every shareholder provoking a contest must elect a domicile at Paris and in default election might be made for him at the office of the imperial procurator; that summonses, etc., should be validly served at the domicile formally or impliedly chosen; that the company became bankrupt and defendant's unpaid calls became payable to plaintiff as assignee; that he made default and provoked a contest; that he never elected a domicile; that plaintiff caused a summons to be served at the office aforesaid; that by the law of France the office provided was the implied domicile of election for the purpose of service and the service was regular; that defendant was bound to appear but did not, whereupon judgment by default was entered against him. The second replication alleged that the defendant was a shareholder, as in first replication mentioned, and stated the provisions of the law of France to the same effect as those contained in the above-mentioned statutory articles of association, but omitting all reference to the statutes or articles of association, and alleging that defendant did not elect a domicile, that the company became bankrupt, etc., and that a summons was served as in first replication stated. It was held by all the Judges who heard the argument that the first replication was good. Kelly, C.B. held that the second replication was also good, but the majority of the Court, Amphlett and Pigott, BB., held that it was bad. On appeal from the decision upon the first replication, the Court of Appeal upheld the judgment of the Court of Exchequer (1 Ex. D. 17, 45 L.J. Ex. 15).

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In giving judgment in the Exchequer Court, Kelly, C.B. said at p. 349 (L. R. 9 Ex.):

> I apprehend that it is now established by the law of this country that one who becomes a shareholder in a foreign company, and therefore and thereby a member of that company—such company existing in a foreign country, and subject in all things to the law of that country—*himself becomes subject to the law of that country, and to the articles or constitutions of that company construed and interpreted according to the law of that country* in all things and as to all matters and all questions existing or arising in relation to or connected with the acts and affairs and the rights and liabilities of such company and its members severally and collectively.

I take it that all the Judges agreed with the statement of the law contained in the above extract. Amphlett, B., with whom Pigott, B. concurred, said at p. 353 (L.R. 9 Ex.):

> As to the first replication demurred to, the Court is unanimously of opinion that the defendant is shown upon the face of it to have contracted with the company, of which he is a shareholder, and whose representative the plaintiff is, that he would, under the circumstances disclosed, be amenable to the jurisdiction of the Court of the Tribunal of Commerce of the Department of the Seine. But as to the second replication, my brother Pigott and myself think that although the allegations are sufficient to show that defendant's contract is to be governed by French law, still that they do not show that he is subject to the jurisdiction of the French Court. The contract must be interpreted by an English tribunal.

The decision on the first replication was appealed to the Court of Appeal and was upheld: 1 Ex. D. 17, 45 L.J. Ex. 15. In giving judgment Lord Cairns said:

> The averment is, that by the law of France he was bound by all the statutes and provisions of the company. The Court of Exchequer have held that a good replication. I am clearly of the same opinion. It appears to me that, to all intents and purposes, it is as if there had been an actual and absolute agreement by the defendant.

It must be borne in mind that the action in the *Copin Case, supra,* was brought upon a foreign judgment and not upon the original cause of action. The case at bar is upon a liability of the defendant arising out of obligations attached by the laws of Minnesota to the holder of shares in the corporation in question, obligations which he is taken to have assumed by voluntarily becoming a shareholder. The contract into which the deceased entered when he applied for, received and accepted the shares was governed by the law of Minnesota and

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was subject to any condition or liability attached to it by that law. It is no defence to say that he did not know of the double liability on the shares. The law made that liability a part of the contract. He must be held to have notice of it. See opinion of Amphlett, J. in *Copin v. Adamson,* at p. 354. The contract was performed on the part of the company and the subscriber received dividends on the shares. He must be held to have accepted the shares subject to the obligations attached to them by law.

The decision upon the second replication in *Copin v. Adamson, supra,* does not affect the present case. That decision was to the effect that an Englishman, who had no domicile in France either actual or by agreement, who had in no manner submitted himself to the jurisdiction of the French Court, or been served by any process, was not bound by a judgment obtained against him in that Court. The present action is brought, not upon a judgment, but upon the double liability on the shares. The proceedings in Minnesota established the representative character, duties and powers of the receiver, the insolvency of the corporation and the doing of certain acts which led up to the accruing of the liability of the shareholder and the perfecting of the demand upon him.

I have discussed *Copin v. Adamson* at almost undue length. I have done so because I regard it as being the leading decision on the subject and as settling the main controversy in the case before us.

The provision upon which the liability of the shareholder is based is contained in the constitution of the State of Minnesota and is in these words:

> Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him. [Article 10, sec. 3, General Statutes of Minnesota, 1913, p. 2093.]

It is clear from leading American authorities that the O. W. Kerr Company does not come within the exception.

By sec. 32 of *The Manitoba Evidence Act,* R.S.M., 1913, ch. 65, the Courts of this province may take judicial notice of the laws of any part of the United States of America and

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may refer to statutes, reports of cases and works upon legal subjects as the Court may deem authentic. In this case we have also the benefit of the expert evidence of Mr. Allen as to the laws of Minnesota, and particularly with reference to the enforcement of stockholders' liability in the case of corporations formed under the laws in force in that State. In considering the effect of the statutes of Minnesota this Court would naturally adopt the interpretation put upon them by the highest Court in that State and by the Supreme Court of the United States.

In *Bernheimer v. Converse*, 206 U.S. 516, it was held by the Supreme Court of the United States that in a State where, as in Minnesota, stockholders' liability is fixed and measured by the constitution, a stockholder upon acquiring his stock incurs an obligation arising from the constitutional provisions, which is capable of being enforced in the Courts not only of that State but of another State and of the United States. Mr. Justice Day in delivering the judgment of the Court enunciated the following principle, at p. 533:

> By becoming a member of the Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulations as the state might lawfully make to render the liability effectual.

The above is in substantial agreement with Chief Baron Kelly's statement of the view adopted by English Courts, as given in the passage I have quoted from his judgment in *Copin v. Adamson*, *supra*.

In *Converse v. Hamilton*, 224 U.S. 242, the provisions in the constitution and laws of Minnesota as to the double liability of a stockholder were discussed. The constitutional validity of these provisions and the power and authority of the receiver of the corporation to enforce the double liability of the stockholder in another State were considered and upheld. The Supreme Court of the United States in this case reversed the decision of the Supreme Court of Wisconsin in which a contrary view was taken.

The certified copies of the proceedings by the plaintiff as receiver of the insolvent corporation together with the other evidence adduced before the trial Judge in this case satisfy me that all proceedings required by the laws of Minnesota to

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render effectual the liability of the shareholder, or bearing upon its enforcement, have been taken in that State. A liability of a contractual nature existed upon the part of each shareholder in the company to contribute, in case of its insolvency, towards the payment of its liabilities to the extent of the amount of his shares. The plaintiff as a quasi-assignee for the benefit of the creditors of the company is entitled to enforce this liability against the shareholder or his personal representatives, and when the shareholder was domiciled in Manitoba the Courts of that province may enforce it.

The appeal should be dismissed with costs.

CAMERON, J.A.—This action is brought by the plaintiff as receiver of the O. W. Kerr Company, a corporation incorporated under the laws of the State of Minnesota for the purpose amongst other of purchasing and selling lands and having its head office at Minneapolis in that State, against the defendants as executors of the estate of the late Sir William Whyte, to recover the sum of $5,000, an amount equal to the par value of 50 shares of the preferred stock of the company held by him, with interest at six per cent. The statement of claim fully sets forth the facts of the case, the laws of the State of Minnesota fixing the liability of shareholders of corporations and prescribing the method of enforcing that liability in the State Courts and the proceedings taken in those Courts pursuant thereto.

The action was tried before Mr. Justice Galt, who gave judgment for the plaintiff for the amount claimed and interest. In his judgment the pleadings, facts and evidence as well as the authorities on the points of law involved are fully dealt with.

Objection was taken on the argument to the admissibility of the evidence presented to establish the incorporation of the O. W. Kerr Company.

Under the laws of Minnesota the method of procuring incorporation differs somewhat from that laid down by our *Companies Act*: (1) There must be a certificate of incorporation, signed by three or more persons constituting themselves a body corporate, and declaring the name of the corporation,

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the general nature of its business, with amount of its capital stock and other particulars set forth in the statute; (2) This certificate is filed and recorded with the Secretary of State and thereafter with the register of deeds, where the principal place of business of the corporation is specified to be in the certificate; (3) The prescribed fees must be paid to the Secretary of State; (4) The certificate must be published as provided; and (5) Proof of the publication is to be filed with the Secretary of State, and upon such filing its corporate organization is complete. Provision is made for the amendment of the certificate of incorporation in respect of any matter which the original certificate might have contained by a majority vote of the shareholders as therein specified, which upon being authenticated and approved, filed and published as in the case of the original certificate becomes effective and complete.

At the trial there was put in as Ex. 1 a certificate of the Secretary of State of the State of Minnesota signed by him and sealed with the Great Seal of the State that he had compared the annexed copies with the original articles and amendments thereof of the O. W. Kerr Company and that the said copies are true and correct transcripts thereof and that the affidavit of publication of the said articles was duly published.

Also as Ex. 2, a certificate of the said Secretary of State, signed by him and sealed with the Great Seal of the State, that he had compared the annexed copy with the articles of incorporation of the O. W. Kerr Company and amendments thereto as recorded in the record of incorporation and of the proof of publication in each case and that the said copy is a true and correct transcript of said instruments and of the whole thereof.

There was also filed at the trial as Ex. 3, a copy of the certificate of incorporation of the said company with the annexed certificate of the register of deeds in and for Hennepin County in the State of Minnesota signed by him and under his official seal, that he had compared the same with the original filed in his office and that the copy is a true and correct transcript and copy of the same.

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Exs. 4 and 5 are copies of the amendments to the articles of incorporation certified to by the register of deeds in like manner.

Finally there is Ex. 6, a certificate of the Secretary of State under the Great Seal of the State that the O. W. Kerr Company was on December 23, 1910, and has since been a corporation duly organized, created and existing under the laws of Minnesota, with an authorized capital of $500,000, divided into 5,000 shares of the par value of $100 each, and that the said charter has never been cancelled or annulled.

In addition to this documentary evidence the plaintiff, the receiver in the proceedings in the Minnesota Court and an attorney at law, testified that he had himself compared Exs. 2, 3, 4 and 5 with the originals of which they purported to be copies and that they were true copies of the same.

Before the passage of the Statutes relating to the admission of documentary evidence there were well-established methods of proving foreign official records and acts of state.

In the absence of some such statutory provision the rule has been laid down that the proper mode of authentication of foreign records or documents other than foreign laws or judicial records must be determined under the guidance furnished by the rules of the common law or the usages of nations, and that any evidence is in general sufficient that legitimately tends to prove that the document offered is in fact certified by the official custodian of the original of which it purports to be a copy and that he has due authority to make such certification. Thus a copy certified under the Great Seal of State is admissible without further authentication. [22 *Corpus Juris*, 855.]

In *National Bank of St. Charles v. De Bernales,* (1825) 1 R. & M. 190, 1 Car. & P. 569, an examined copy of a charter deposited in the proper public office at Madrid was allowed in evidence.

Here we have copies of the articles of incorporation and the amendments thereto certified by the Secretary of State of Minnesota under the Great Seal, and, in addition, the certificates of the register of deeds under his seal of office.

Furthermore the certificates of the Secretary of State are admissible under *The Evidence Act,* 14 & 15 Vict., ch. 99, sec. 9. They relate to "acts of state" as therein mentioned.

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The official acts of every state or potentate whose independence has been recognized by the Crown, and of their authorized agents, are acts of State. [23 *Halsbury*, p. 310.]

A foreign patent is an "act of state" within the meaning of this section. [*In re Betts' Patent*, 1 Moo. P.C. (N.S.) 49, 9 Jur. (N.S.) 137; *Roscoe, Nisi Prius*, 100.]

See also 13 *Halsbury*, 527:

Acts of state of a foreign state * * * may be proved by examined and authenticated copies.

The Act of 14 & 15 Vict. has been held to expand the common law. See Erle, C.J. in *Motteran v. Eastern Counties Ry.*, 7 C.B. (N.S.) 58, at p. 71, 29 L.J.M.C. 57.

The certificates not only authenticate the copies of the articles but certify them to be examined copies. And not only have we this evidence but also that of the plaintiff, who testified that he had compared the copies with the originals on record. I see no ground whatever for refusing to admit the documents. It is difficult to see what further steps could have been taken to perfect this evidence.

The argument that *The Manitoba Evidence Act*, R.S.M., 1913, ch. 35, displaces and supersedes the Act of 14 & 15 Vict. is wholly ineffective in view of the express provisions of sec. 33. Apart from this provision, such an Act is to be construed cumulatively.

Objection was also taken to the admissibility of documents purporting to be certified copies of the proceedings in the Courts of Minnesota. But the provisions of sec. 13 of our *Evidence Act* apply and have been complied with.

The liability sought to be enforced here is founded on the following provision in the constitution of the State of Minnesota.

Each stockholder in any corporation, except in those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him. [See Revised Statutes of Minnesota, 1905, p. 1186.]

In the Statutes of the State of Minnesota provisions are made prescribing the proceedings to be taken to ascertain and enforce this liability of the shareholder in the event of the insolvency of the company. Upon complaint of a judgment

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creditor, whose execution against the corporation has been returned unsatisfied, the Court may sequestrate the property of the corporation and appoint a receiver thereof. The receiver then alleging the existence of a constitutional or other liability of the stockholders and that it is necessary to resort to the same secures from the Court a date to hear his application and to give such notice as might be deemed proper. Upon the hearing the Court then considers the evidence as to: (1) The nature and probable extent of the indebtedness of the corporation; (2) The probable expense of the receivership; (3) The probable amount of the available assets; and (4) The parties liable as stockholders, the nature and extent of their liability and their probable solvency and the Court, if necessary, may order a rateable assessment on the stockholders or otherwise as may be deemed necessary and shall direct the payment of the amount so assessed against each share to the receiver. On failure of any one liable to such assessment to pay the same within the time prescribed the order may authorize the receiver to bring an action against him wherever found and such order shall be conclusive as to all matters and as to all parties therein adjudged liable whether appearing or being represented at the hearing or not, or having notice thereof or not. Upon the expiration of the time fixed in the order of assessment the receiver shall commence an action as against every party so assessed and failing to pay wherever he is found unless he satisfies the Court that it is useless or too costly to do so.

These statutory provisions were complied with so far as the necessary proceedings in the Minnesota Court were concerned, as appears by the authenticated copy of the proceedings filed. A copy of the order of the District Judge dated at Minneapolis, January 24, 1916, ordering that the receiver's petition be heard on March 11, 1916, when the Court would proceed to consider the nature and probable extent of the indebtedness of the corporation and the other particulars required by the statute as aforesaid and directing publication and service by mailing of the order itself and a copy of the order of the District Judge, dated April 1, 1916, declaring the liability of the shareholders and ordering an assessment of

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$100 on each share and authorizing the receiver to bring such actions as might be necessary to recover same and directing the receiver to give notice of the order by mailing a copy of the same to each shareholder, were produced by the defendant's manager, who admitted their receipt at or about their dates. These orders are fully set out in the judgment of Mr. Justice Galt.

It thus appears that the liability of a shareholder in this corporation has its origin in the constitutional provision above quoted, but that liability is not finally determined and does not become enforceable until the order of assessment is made by the Court pursuant to the statute.

In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction where the party objecting to the jurisdiction of such Court has, by his own conduct, submitted to such jurisdiction, i.e., has precluded himself from objecting thereto, by having expressly or impliedly contracted to submit to the jurisdiction of such Court. *Dicey, Conflict of Laws,* 361-2. For this statement of the law the author cites *Copin v. Adamson,* 1 Ex. D. 17, 45 L.J. Ex. 15; *Valles v. Dumergue,* 4 Ex. 290; *Bank of Australasia v. Harding,* 9 C.B. 661, 19 L.J.C.P. 345; *Bank of Australasia v. Nias,* 16 Q.B. 717, 20 L.J.Q.B. 284 and other cases. I refer also to *Feyerick v. Hubbard,* 71 L.J.K.B. 509, 86 L.T. 829, and *Jeannot v. Fuerst,* 100 L.T. 816, 53 S.J. 449.

In *Emanuel v. Symon* [1918] 1 K.B. 302, at p. 314, 77 L.J.K.B. 180, Kennedy, L.J. says,

> In *Copin v. Adamson, supra,* there is an express decision that a subject of this country does not by the mere fact of becoming a shareholder in a foreign company submit himself necessarily to the jurisdiction of the foreign courts.

That is to say the mere fact that Sir William Whyte was a shareholder of this Minnesota company would not necessarily be decisive of his agreement to submit to the jurisdiction of the Courts of that State. There must be evidence to show that he expressly or impliedly contracted to submit to the jurisdiction of the Minnesota Courts.

In this case there is more than the mere fact of being a shareholder. There is the stock certificate purporting on its

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face to be issued according to the laws of the State of Minnesota. The name of the corporation "The O. W. Kerr Company" indicates no limitation of liability but the contrary. The certificate leads back to the articles of association and they are based on and derive from the general statutes of the State, which give the State Courts the powers set out above. All these relevant provisions become part of his contract. This branch of the case has been fully dealt with by Mr. Justice Dennistoun and I agree with his views and conclusions thereon. With the other matters raised on the argument and discussed by him in his judgment I also concur.

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DENNISTOUN, J.A.—This is an appeal by the defendants as executors of the estate of the late Sir William Whyte from a judgment of Galt, J. in the Court of King's Bench whereby the estate was found liable in the sum of $5,000 and interest, assessable as double liability upon stock in the O. W. Kerr company of Minneapolis which is insolvent, and of which the plaintiff has been appointed receiver by the Courts of the State of Minnesota.

The stock was fully paid for on subscription and the double liability is imposed by virtue of a provision in the constitution of the State of Minnesota applicable to all corporations excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business. The O. W. Kerr Company is primarily a land company.

This is not an action on a judgment but is one to enforce a liability imposed by the laws of Minnesota on shareholders of an insolvent company after determination of certain facts by the District Courts of Minnesota as *personae designatae* by statute.

The proceedings taken in the Courts of Minnesota to show the necessity for a resort to the double liability and the assessment of that liability are taken as the basis of the action in the Courts of Manitoba.

Sir William Whyte was a British subject domiciled in Canada, and it is necessary, first of all, to arrive at a conclusion as to the jurisdiction, if any, acquired over him or his estate by the foreign Court, and, secondly, the sufficiency of the proof

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and the admissibility of the evidence tendered at the trial in the Court of King's Bench to establish liability and entitle the receiver to judgment in this province.

It was frankly admitted by counsel for the appellant that had Sir William Whyte been an American citizen or had he been resident within the territorial jurisdiction of the Minnesota Courts no defence would be available. None was attempted on the merits. The case rests on the validity of the proceedings taken to enforce the claim.

In *Schibsby v. Westenholtz* (1870) L.R. 6 Q.B. 155, at p. 161, 40 L.J.Q.B. 73, Blackburn, J. formulates four rules which have been relied on in subsequent cases for the determination of the liability of defendants who are sued upon a foreign judgment to the effect that they must bear an absolute or a qualified or a temporary allegiance to the country in which the Court is. Lord Blackburn's rules are:

(1) If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them its laws bind them.

(2) If the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or as it is sometimes expressed, owing temporary allegiance to that country its laws bind them.

(3) If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we are inclined to think its laws bind them.

(4) If a person selected as plaintiff the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.

Baron Amphlett adds a fifth rule in *Copin v. Adamson* (1874) L.R. 9 Ex. 345, at p. 355, 43 L.J. Ex. 161.

(5) A man may contract with others that his rights shall be determined not only by foreign law but by a foreign tribunal, and thus by reason of his contract, and not of any

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allegiance absolute or qualified would become bound by that tribunal's decision.

To these rules may be added another which is generally conceded:

(6) Voluntary submission to the jurisdiction of a foreign Court by entering appearance to its process will make its judgments binding: *Rousillon v. Rousillon,* 14 Ch. D. 351, at p. 371, 49 L.J. Ch. 338.

In *Emanuel v. Symon* [1908] 1 K.B. 302, at p. 309, 77 L.J.K.B. 180, Buckley, L.J. restates these rules omitting rule 3, which was formulated with some doubt by Blackburn, J.

It is under the fifth rule that the executors of the estate of Sir William Whyte are said to be liable.

An examination of facts surrounding the making of the contract establishes that Sir William Whyte applied for, and received, his share certificate in Canada and paid for the 50 shares issued to him by cheque to the O. W. Kerr Company's agent at Winnipeg. He was recorded as a holder of preference stock at the head office of the company at the city of Minneapolis in the State of Minnesota, and from time to time received dividends as a shareholder remitted from the head office. A stock certificate dated January 25, 1911, was duly delivered and is produced by the executors from the documents of the deceased. It contains the words at the top of the certificates "Incorporated under the laws of Minnesota," and certifies that William Whyte, Winnipeg, is the owner of 50 shares of the preferred stock of the O. W. Kerr Company.

The certificate of incorporation of the O. W. Kerr Company was filed in the office of the Secretary of State for Minnesota on January 28, 1907. It recites in opening:

> The undersigned agree to and do hereby associate themselves as a body corporate for the purposes hereinafter expressed, and do hereby under and pursuant to the laws of the State of Minnesota, incorporate ourselves and our successors, and to that end we hereby adopt and sign the following Certificate of Incorporation, etc.

When Sir William Whyte accepted the status of a shareholder in this company as determined by the words quoted, he not only contracted to be bound by the laws of the State of

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Minnesota in respect to that contract as fully and specifically as if the laws applicable had been incorporated into and set forth word for word in the certificate of incorporation, but in addition he agreed to submit himself in common with all other shareholders to the jurisdiction of the Minnesota Courts and to be bound by their process for the relief of creditors, as set forth in the statutes of the State, in the event of the company becoming insolvent.

The case of *Copin v. Adamson, supra,* was relied on by counsel for both parties on the argument before this Court.

On behalf of the receiver it was urged that this case falls within the terms of the first replication which was held good, while on behalf of the Whyte estate it was argued that it comes within the terms of the second replication which was held bad. The action was taken on a French judgment; the defendant pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the Court, or subject to French law; that he was never served with any process; nor had any notice or opportunity of defending himself.

The plaintiff met this plea by two replications which are too lengthy to be set out *in extenso*. I am content to indicate in a few words what they contained.

The first replication alleged that the defendant was the holder of shares in a French company having its legal domicile at Paris, and became thereby subject by the law of France to all liabilities belonging to the holders of shares. That he further became subject to the conditions contained in the articles of association, which made provision for the submission of all disputes to the jurisdiction of the French Court, for the fixing of the domicile of shareholders, for service of process at that domicile, and alleging further that judgment had been duly recovered in the French Courts *in accordance with the provisions of the articles of association* and of the law of France.

The second replication was in most respects similar, alleging that defendant was a shareholder, and stating the provisions of the French law to the same effect as those contained in the articles of association *but omitting all reference to the*

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articles of association, and alleging that the defendant did not elect a domicile and that a summons was served as in the first replication stated.

It was held on demurrer by Kelly, C.B., Amphlett, B. and Pigott, B., that the first replication was good, and by Amphlett, B. and Pigott, B., that the second replication was bad.

This judgment was affirmed by Cairns, L.C., Blackburn and Brett, JJ., 1 Ex. D. 17, 45 L.J. Ex. 15.

The Lord Chancellor says at p. 18, that the statutes and provisions of the articles of association were "agreements *inter socios*"; and at p. 19 (1 Ex. D.) he says:

> It appears to me that, to all intents and purposes, it is as if there had been an actual and absolute agreement by the defendant; and that if it were necessary to bring an action against him on the part of the company, the service of the proceedings at the office of the imperial procurators, if no other place were pointed out, would be good service.

In other words the first replication was good because the defendant had expressly contracted to submit himself to the laws of France and the jurisdiction of the French Courts, and the second replication was bad because the plaintiff relied not on any agreement by the defendant but on the general law of France, and the case was not brought within the terms of the fifth rule above stated.

Copin v. Adamson was much discussed in *Emanuel v. Symon, supra.* Kennedy, L.J. at p. 314 ([1908] 1 K.B.) says:

> In *Copin v. Adamson* there is an express decision that a subject of this country does not by the mere fact of becoming a shareholder in a foreign company submit himself necessarily to the jurisdiction of the foreign Courts, and it seems to me that what applies to a company applies equally to a partnership.

Had the certification of incorporation in the case at bar been silent as to the law and procedure which should govern the rights and liabilities of the shareholders Sir William Whyte's position might possibly have been that indicated by Lord Justice Kennedy, and the executors would have been in a strong position to maintain that the Courts of Minnesota had acquired no jurisdiction *in personam* over them, and that the liquidation proceedings of the O. W. Kerr Company

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bound only the property and assets of the estate in Minnesota. But the certificate is not silent on the point. By agreement *inter socios* these shareholders undertook to be bound by all the laws of the state applicable to them as shareholders, to the company, and to its creditors, including the procedure to be taken against them, the service of process, and the assessment of the double liability on the stock held.

In the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors. [Lord Watson in *Huntington v. Attrill* (1893) A.C. 150, at p. 159, 62 L.J.P.C. 44.]

Nevertheless there must be an express or clearly implied agreement on the part of the shareholder to submit himself to the burdens imposed by the foreign law. *Bisdon Iron and Locomotive Works v. Furness* [1906] 1 K.B. 49, 75 L.J.K.B. 83; *Feyerick v. Hubbard*, 71 L.J.K.B. 509, 86 L.T. 829.

In my humble judgment it is reasonable that the liability of a non-resident shareholder to creditors should be fixed by the law of the country in which the company is situate where those laws are not penal in their character, but on the contrary limit the liability which would without them be imposed at common law. Any person taking shares in the O. W. Kerr Company should assume that his liability is unlimited. The name carried on its face all the obligations and responsibilities of a partnership. It is only by virtue of the laws of Minnesota that the liability of shareholders to creditors is limited to the amount of stock held. Why should a non-resident shareholder be permitted to evade a law which has been passed for his benefit, and while accepting immunity from the claims of creditors which that law gives, repudiate the lesser liability which it imposes upon him. He cannot "approbate and reprobate" at the same time. Such law is the very foundation upon which the corporation has been built and cannot be separated from it. See Hagarty, C.J.O., in *Huntington v. Attrill*, 18 O.A.R. 136, at p. 145.

No question is raised as to the sufficiency and regularity of the proceedings taken to assess the double liability upon the shareholders of this company. The process leading up to the making of the order by the District Court was duly brought

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to the notice of these executors both by registered post and by advertisement in accordance with the Minnesota statute law. This is admitted by counsel and has been proved by evidence adduced at the trial.

The conclusion is therefore reached that the defendants were subject to the law imposing double liability, and by contract they were subject to the jurisdiction of the Minnesota Court, and in accordance with the law and the practice of that Court they were properly before it when the assessment order was made. No appeal from it has been taken, and it is now final and conclusive as against all the shareholders of the company.

It only remains to consider the sufficiency of the proceedings which have been taken and the evidence by which they have been proved in the Court of King's Bench.

The defendants did not attempt at the trial to refute any of the facts relied on by the plaintiff but were content to rest their case upon the absence of legal evidence in proof of those facts.

The first objection is in respect to the proof of the law of Minnesota. That point is determined by sec. 32 of *The Manitoba Evidence Act*, R.S.M., 1913, ch. 65, which enables the Courts of this province to take judicial notice of the laws of any part of the United States of America and to refer to statutes, reports of cases, evidence on oath, etc. These three methods of proof were taken in this case. Expert evidence was given by the receiver who appears to be a duly qualified attorney of the State, the statutes and decided cases were produced. There was ample proof of the law.

Incorporation of the O. W. Kerr Company, and the proceedings before the Minnesota Courts were duly proved under the provisions of *Lord Brougham's Act*, 14-15 Vict., ch. 99, and *The Manitoba Evidence Act*, which are cumulative. I agree with my brother Cameron on this point. Not only were copies duly certified by the Secretary of State under the State seal tendered and admitted as acts of state, but examined copies proved such by oral testimony were submitted and filed, and certificates of the proper officers under the seal of the

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Court were in all cases supplied. *Leishman v. Cochrane,* 1 Moo. P.C. (N.S.) 315, 9 L.T. 104.

The proceedings taken to establish insolvency and leading up to the making of the order of assessment, are set out in the judgment of Galt, J. and I fully concur with the conclusions at which he has arrived in respect to them.

One other point may be briefly referred to. It was argued that the double liability imposed by the State constitution did not apply to companies organized for the purpose of carrying on any kind of manufacturing or mechanical business and attention was drawn to the powers given the O. W. Kerr Company to manufacture logs, timber and lumber, to operate grist mills, and to do a general store business. This point has been settled by the Supreme Court of Minnesota in the case of *Seymour v. Church Plant,* 84 N.W.R. 109, and *Meen v. Pioneer Co.,* 97 N.W.R. 140, to the effect that where other than manufacturing and mechanical powers are granted by the certificate of incorporation, the double liability in favour of creditors exists. The decisions of the State Courts are to be noticed judicially in our Courts in determining the state law, under the provisions of *The Manitoba Evidence Act,* ch. 65, R.S.M., 1913, sec. 32. In any event the reasoning and conclusions of the Judges in the cases referred to are convincing, and inasmuch as the O. W. Kerr Company is a land company with certain ancillary powers it is beyond question that the double liability of the shareholders exists.

The objection that the constitutional imposition of double liability is penal in its character and not enforceable by the Courts of a foreign country is disposed of by the judgment of the Privy Council in *Huntington v. Attrill, supra.* The remedy here given is for the protection of the private rights of creditors, and is not a penalty recoverable in favour of the state. This is the test applied by the Privy Council in respect to legislation of a similar character in that case and disposes of the objection.

Mr. Williams argued that the clause in the constitution which creates the liability in question does not, and should not be held by our Courts to, impose a double liability. It is very

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brief and I see possibilities of much argument as to how it should be construed. It says:

> Article 10, Sec. 3. Liability of Stockholders. Each stockholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him.

It has been decided by the Supreme Court of Minnesota that this section does impose a double liability: 4 *Thompson on Corporations,* 4793; *Willis v. St. Paul Sanitation Co.,* 50 N.W.R. 1110.

In my opinion we are bound to accept these decisions as conclusive as to the law of the State. The placing of a different construction on the meaning of the section by this or any other foreign Court would in no way alter the law by which this case must be governed.

In *Huntington v. Attrill, supra,* the Privy Council decided that the Courts of Ontario were not bound to accept the decisions of the Courts of New York State as to what constituted a penal action, for the reason that what was being determined in that case, was not the law of New York, but the rule of international law which a British Court would enforce, and that it was the duty of the British Court to determine the rule for itself untrammelled by the divergent views of the New York Courts.

In the case at bar it is the law of the State of Minnesota which we have to determine.

The case of *Hale v. Allinson,* 188 U.S. 56, is a decision of the Supreme Court of the United States adverse to the right of a receiver to recover against a foreign shareholder under the law of Minnesota as it stood when that case was tried. An amendment of the statute law by ch. 272 of 1899 now included in the General Statutes of 1913, secs. 6645 to 6651, has removed the disability as settled by *Bernheimer v. Converse,* 206 U.S. 516, and *Converse v. Hamilton,* 224 U.S. 242.

Upon the whole case I concur with the views of Mr. Justice Galt at the trial and would affirm his judgment.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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APPENDIX I.

The Benchers of The Law Society of Manitoba by resolution on the 24th February, 1921, expressed their approval of the following:

CANONS OF LEGAL ETHICS

Approved by the Canadian Bar Association, at the Fifth Annual Meeting, Ottawa, September 2nd, 1920, as a correct, though not exhaustive, statement of some of the ethical principles which should be observed by the members of the legal profession.

It is not possible to frame a set of rules which will particularize all the duties of the lawyer in all the varied relations of his professional life and no attempt has been made to do so.

The following Canons of Ethics should therefore be construed as a general guide and not as a denial of the existence of other duties equally imperative though not specifically mentioned.

The lawyer is more than a mere citizen. He is a minister of justice, an officer of the Courts, his client's advocate, and a member of an ancient, honorable and learned profession.

In these several capacities it is his duty to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and true to himself.

1. To the State

(1) He owes a duty to the State, to maintain its integrity and its law and not to aid, counsel, or assist any man to act in any way contrary to those laws.

(2) When engaged as a public prosecutor his primary duty is not to convict but to see that justice is done; to that end he should withhold no facts tending to prove either the guilt or innocence of the accused.

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(3) He should take upon himself without hesitation and if need be without fee or reward, the cause of any man assigned to him by the Court and exert his best efforts on behalf of the person for whom he has been so assigned counsel.

(4) It is a crime against the State and therefore highly nonprofessional in a lawyer, to stir up strife or litigation by seeking out defects in titles, claims for personal injury or other causes of action for the purpose of securing or endeavoring to secure a retainer to presecute a claim therefor; or to pay or reward directly or indirectly any person, for the purpose of procuring him to be retained in his professional capacity.

2. To the Court

(1) His conduct should at all times be characterized by candor and fairness. He should maintain towards the Judges of the Courts a courteous and respectful attitude and insist on similar conduct on the part of his client, at the same time maintaining a self-respecting independence in the discharge of his professional duties to his client.

(2) Judges, not being free to defend themselves, are entitled to receive the support of the Bar against unjust criticism and complaint. Whenever there is proper ground for serious complaint of a judicial officer, it is a right and duty of the lawyer to submit the grievance to the proper authorities.

(3) He should not offer evidence which he knows the Court should not admit. He should not, either in argument to the Court or in address to the jury, assert his personal belief in his client's innocence, or in the justice of his cause, or as to any of the facts involved in the matter under investigation.

(4) He should never seek to privately influence, directly or indirectly, the judges of the Court in his favor, or in that of his client, nor should he attempt to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort.

3. To the Client

(1) He should obtain full knowledge of his client's cause before advising thereon and give a candid opinion of the merits and probable results of pending or contemplated litiga-

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tion. He should beware of bold and confident assurances to clients especially where the employment may depend on such assurances. He should bear in mind that seldom are all the law and facts on the side of his client and that *"audi alteram partem"* is a safe rule to follow.

(2) He should at the time of retainer disclose to the client all the circumstances of his relations to the parties and his interest in or connection with the controversy, if any, which might influence the client in selection of counsel. He should avoid representing conflicting interests.

(3) Whenever the controversy will admit of fair adjustment the client should be advised to avoid or to end the litigation.

(4) He should treat adverse witnesses, litigants, and counsel with fairness, refraining from all offensive personalities. He must avoid imparting to professional duties the client's personal feelings and prejudices. At the same time he should discharge his duty to his client with firmness and without fear of judicial disfavor or public unpopularity.

(5) He should endeavor by all fair and honorable means to obtain for his client the benefit of any and every remedy and defence which is authorized by law. He must, however, steadfastly bear in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less does it demand of him, for any client, violation of law or any manner of fraud or chicanery.

(6) It is his right to undertake the defence of a person accused of crime, regardless of his own personal opinion as to the guilt of the accused. Having undertaken such defence, he is bound by all fair and honorable means to present every defence that the law of the land permits to the end that no person may be deprived of life or liberty but by due process of law.

(7) He should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject matter of the litigation being conducted by him. He should act for his client only and having once acted for him he should

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not act against him in the same matter or in any other matter related thereto, and he should scrupulously guard and not divulge his client's secrets or confidences.

(8) He should report promptly to his client the receipt of any monies or other trust property and avoid the co-mingling with his own, or use of trust money or property.

(9) He is entitled to reasonable compensation for his services but he should avoid charges which either over-estimate or under-value the service rendered. When possible he should adhere to established tariffs. The client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge or even none at all.

(10) He should avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. He should always bear in mind that the profession is a branch of the administration of justice and not a mere money getting trade.

(11) He should not appear as witness for his own client except as to merely formal matters, such as, the attestation or custody of an instrument, or the like, or when it is essential to the ends of justice. If he is a necessary witness with respect to other matters, the conducting of the case should be entrusted to other counsel.

4. To His Fellow Lawyer

(1) His conduct towards his fellow lawyer should be characterized by courtesy and good faith. Whatever may be the ill-feeling existing between clients it should not be allowed to influence counsel in their conduct and demeanor towards each other or towards suitors in the case. All personalities between counsel should be scrupulously avoided as should also colloquies between counsel which cause delay and promote unseemly wrangling.

(2) He should endeavor as far as possible to suit the convenience of the opposing counsel when the interests of his client or the cause of justice will not be injured by so doing.

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(3) He should give no undertaking he cannot fulfil and he should fulfil every undertaking he gives. He should never in any way communicate upon the subject in controversy, or attempt to negotiate or compromise the matter directly with any party represented by a lawyer, except through such lawyer.

(4) He should avoid all sharp practice and he should take no paltry advantage when his opponent has made a slip or overlooked some technical matter. No client has a right to demand that his counsel shall be illiberal or that he shall do anything repugnant to his own sense of honor and propriety.

5. To Himself

(1) It is his duty to maintain the honor and integrity of his profession and to expose without fear or favor before the proper tribunals unprofessional or dishonest conduct by any other member of the profession, and to accept without hesitation a retainer against any member of the profession who is alleged to have wronged his client.

(2) It is the duty of every lawyer to guard the Bar against the admission to the profession of any candidate whose moral character or education unfits him for admission thereto.

(3) The publication or circulation of ordinary simple business cards is not *per se* improper but solicitation of business by circulars or advertisements or by personal communications or interviews not warranted by personal relations, is unprofessional. It is equally unprofessional to seek retainers through agents of any kind. Indirect advertisement for business by furnishing or inspiring newspaper comment concerning causes in which the lawyer has been or is connected, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and like self-laudations defy the traditions and lower the tone of the lawyer's high calling, and should not be tolerated. The best advertisement for a lawyer is the establishment of a well-merited reputation for personal capacity and fidelity to trust.

(4) No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client; he has a right to decline employment.

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(5) No client is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the State, or disrespect for the judicial office, or the corruption of any persons exercising a public or private trust, or deception or betrayal of the public.

(6) Every lawyer should bear in mind that the oath of office taken on his admission to the Bar is not a mere form but is a solemn undertaking and on his part should be strictly observed.

(7) He should also bear in mind that he can only maintain the high traditions of his profession by being in fact as well as in name a gentleman.

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APPENDIX II.

PRIVY COUNCIL

JUDICIAL COMMITTEE

At the Court at Buckingham Palace, the 28th day of November, 1910.

Whereas by an Act passed in a Session of Parliament held in the seventh and eighth years of Her late Majesty Queen Victoria's reign (shortly entitled "The Judicial Committee Act, 1844"), it was enacted that it should be competent to her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad, although such Court should not be a Court of Errors or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon:

And whereas by an Order in Council dated the 26th day of November, 1892, provision was made for the prosecution and regulation of Appeals from the Court of Queen's Bench of the Province of Manitoba in the Dominion of Canada to Her Majesty in Council:

And whereas by an Act of the said Province of Manitoba passed in the sixth year of the reign of His late Majesty King Edward VII., and being Chapter 18, entitled "An Act respecting a Court of Appeal for Manitoba and to amend the King's Bench Act" there was enacted and now exists a Court of Appeal for Manitoba called "The Court of Appeal" consisting of a Chief Justice styled Chief Justice of Manitoba, and three other judges called Judges of Appeal, which Act provided that after the coming into force thereof the said Court of Appeal should be vested with and should exercise

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all the rights, power, and duties theretofore held, exercised, and enjoyed under and by virtue of "The King's Bench Act" or any other statute of the said Province or of the Dominion of Canada by the Court of King's Bench sitting en banc and as a Court of Appeal from the judgment, decision, order, or decree of a single Judge, or verdict of a Jury or of a County Court Judge, or verdict of a County Court jury, and that the said Court of King's Bench should cease to have or exercise any appellate jurisdiction, and that thereafter all applications for new trials and all Appeals of the nature of those which had theretofore been heard and disposed of by or before the Court of King's Bench sitting en banc should be brought before and heard and disposed of by the Court of Appeal created by said Act:

And whereas no provision has yet been made for the prosecution and regulation of Appeals to His Majesty in Council from the said Court of Appeal:

And whereas it is expedient with a view to equalizing as far as may be the conditions under which His Majesty's subjects beyond the Seas shall have a right of appeal to His Majesty in Council, and to promoting uniformity in the practice and procedure in all such Appeals, that the said Order in Council dated the 26th day of November, 1892, should be revoked and that provision should be made for Appeals from the Court of Appeal of Manitoba to His Majesty in Council:

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the said Order in Council dated the 26th day of November, 1892, be, and the same is hereby revoked, and that the Rules hereunder set out shall regulate all Appeals to His Majesty in Council from the Court of Appeal of the Province of Manitoba.

[Reference, The Weekly Notes 1910, Part II., p. 377].

[The enacting part is identical with the regulations made for appeals from Western Australia which were set out in The Weekly Notes 1909, Part II., p. 291 as follows]:

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PRIVY COUNCIL

JUDICIAL COMMITTEE

Order in Council Regulating Appeals from the Supreme Court of Western Australia, to His Majesty in Council.

At the Court at Buckingham Palace, the 28th day of June, 1909.

* * * * * *.

Whereas by an Act passed in a Session of Parliament held in the seventh and eighth years of Her late Majesty's reign (shortly entitled "The Judicial Committee Act, 1844") it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of Justice within any British Colony or Possession abroad, although such Court should not be a Court of Errors or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon:

And whereas by an Order in Council, dated the 11th of October, 1861, provision was made for Appeals from the Supreme Court of the Colony of Western Australia to Her Majesty in Council:

And whereas the Colony of Western Australia is now a State of the Commonwealth of Australia constituted by an Act passed in a Session of Parliament held in the sixty-third and sixty-fourth years of Her late Majesty's reign and entitled "An Act to Constitute the Commonwealth of Australia."

And whereas it is expedient, with a view to equalizing as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of Appeal to His Majesty in Council and to promoting uniformity in the practice and procedure in all such Appeals,

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that the said Order in Council, dated 11th of October, 1861, should be revoked and new provision made for Appeals from the said Supreme Court to His Majesty in Council:

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the said Order in Council be and the same is hereby revoked, and that instead thereof the Rules hereunder set out shall regulate all Appeals to His Majesty in Council from the said State of Western Australia.

1. In these Rules, unless the context otherwise requires:

"Appeal" means Appeal to His Majesty in Council;

"His Majesty" includes His Majesty's heirs and successors;

"Judgment" includes decree, order, sentence or decision;

"Court" means either the Full Court or a single Judge of the Supreme Court of Western Australia according as the matter in question is one which, under the Rules and Practice of the Supreme Court, properly appertains to the Full Court or to a single Judge;

"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

"Registrar" means the Registrar or proper officer having the custody of the Records in the Court appealed from;

"Month" means calendar month;

Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie:

(a) As of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and

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(b) At the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court the question involved in the Appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where, in any action or other proceeding, no final judgment can be duly given in consequence of a difference of opinion between the Judges, the final judgment may be entered pro forma on the application of any party to such action or other proceeding according to the opinion of the Chief Justice, or, in his absence, of the senior puisne Judge of the Court, but such judgment shall only be deemed final for purposes of an Appeal therefrom and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the Applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance:

(a) Upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellants not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be) and

(b) Upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

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6. Where the judgment appealed from requires the Appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the Appeal, as to the Court shall seem just and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as His Majesty in Council shall think fit to make thereon.

7. The preparation of the Record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court; and the Court shall give such directions thereon as the justice of the case may require.

8. The Registrar, as well as the parties and their legal Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and generally to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the Record.

9. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the grounds that it is unnecessary or irrelevant, and the other party nevertheless insists upon it being included, the Record, as finally printed (whether in Western Australia or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

10. The Record shall be printed in accordance with the Rules set forth in the Schedule hereto. It may be so printed either in Western Australia or in England.

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11. Where the Record is printed in Western Australia, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal, if any, of the Court.

12. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

13, Where part of the Record is printed in Western Australia and part is to be printed in England, Rules 11 and 12 shall, as far as practicable, apply to such parts as are printed in Western Australia and such as are to be printed in England respectively.

14. The reasons given by the Judge, or any of the Judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises shall by such Judge or Judges be communicated in writing to the Registrar, and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted.

15. Where there are two or more applications for leave to appeal arising out of the same matter, and the Court is of opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the appeals should be consolidated, the Court may direct the appeals to be consolidated and grant leave to appeal by a single order.

16. An Appellant who has obtained an order granting him conditional leave to appeal may at any time prior to the making of an order granting him final leave to appeal withdraw his Appeal on such terms as to costs and otherwise as the Court may direct.

17. Where an Appellant, having obtained an order granting him conditional leave to appeal, and having complied with

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the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave to appeal, the Court may, on an application in that behalf made by the Respondent, rescind the order granting conditional leave to appeal, notwithstanding the Appellant's compliance with the conditions imposed by such order, and may give such directions as to the costs of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.

18. On an application for final leave to appeal, the Court may inquire whether notice, or sufficient notice, of the application has been given by the Appellant to all parties concerned, and, if not satisfied as to the notice given, may defer the granting of the final leave to appeal, or may give such other directions in the matter as in the opinion of the Court the justice of the case requires.

19. An Appellant who has obtained final leave to appeal shall prosecute his appeal in accordance with the Rules for the time being regulating the general practice and procedure in Appeals to His Majesty in Council.

20. Where an Appellant having obtained final leave to appeal, desires, prior to the dispatch of the Record to England, to withdraw his Appeal, the Court may, upon an application in that behalf made by the Appellant, grant him a certificate to the effect that the Appeal has been withdrawn, and the Appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

21. Where an Appellant, having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring the dispatch of the Record to England, the Respondent may, after giving the Appellant due notice of his intended application, apply to the Court for a certificate that the Appeal has not been effectually prosecuted by the Appellant, and if the Court sees fit to grant such a

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certificate, the Appeal shall be deemed, as from the date of such certificate, to stand dismissed for non-prosecution without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

22. Where at any time between the order granting final leave to appeal and the dispatch of the Record to England the Record becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court may, notwithstanding the order granting final leave to appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the Record in place of, or in addition to, the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the Record as aforesaid without express Order of His Majesty in Council.

23. Where the Record subsequently to its dispatch to England becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered, on the Record, in place of, or in addition to, the party who has died or undergone a change of status.

24. The Case of each party to the appeal may be printed either in Western Australia or England, and shall, in either event, be printed in accordance with the Rules set forth in the Schedule hereto, every tenth line thereof being numbered in the margin and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal, or by the party himself if he conducts his appeal in person.

25. The Case shall consist of paragraphs numbered consecutively, and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be

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urged by the party lodging the same, and the reasons of Appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The taxing officer, in taxing the costs of the Appeal, shall, either of his own motion or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

26. Where the Judicial Committee directs a party to bear the costs of an Appeal incurred in Western Australia, such costs shall be taxed by the proper officer of the Court in accordance with the Rules for the time being regulating taxation in the Court.

27. The Court shall conform with, and execute, any Order which His Majesty in Council may think fit to make on an Appeal from a judgment of the Court in like manner as any original judgment of the Court should or might have been executed.

28. Nothing in these Rules contained shall be deemed to interfere with the right of His Majesty, upon the humble Petition of any person aggrieved by any judgment of the Court, to admit his Appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose.

SCHEDULE

I. Records and Cases in Appeals to His Majesty in Council shall be printed in the form known as Demi Quarto (i.e., 54 ems in length and 42 in width).

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

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PREPARATION OF RECORDS IN PRIVY COUNCIL APPEALS FOR PRINTING

The Registrar of the Privy Council has prepared the following instructions for the guidance of London Solicitors in preparing Records for printing in England.

The instructions show the manner in which the Lords of the Judicial Committee desire Records to be arranged, and may in this respect be of assistance to Courts abroad in printing Records, although some alteration in detail may be necessary. For instance, in the case of Records printed in India, which, for special reasons it has been suggested should be sent to England in three Parts, Part I, mentioned below would be divided into two Parts, and Part II would become Part III.

1. GENERAL ARRANGEMENT

Records should be arranged in two parts in the same volume, viz.:

I. The pleadings and proceedings, the transcript of the evidence of the witnesses, the Judgments, Decrees, &c. of the Courts below, down to the Order admitting the Appeal.

II. The Exhibits and documents.

2. INDEX

The Index to Part I. should be in chronological order.

The Index to Part II. should follow the order of the exhibit mark.

3. RECORD

Part I. should be arranged strictly in chronological order, i.e., in the same order as the index.

Part II. should be arranged in the most convenient way for the use of the Board, as the circumstances of the case require. The documents should be printed as far as suitable in chronological order, mixing Plaintiff's and Defendant's documents together when necessary. Each document should show its exhibit mark and whether it is a Plaintiff's or Defendant's document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter such as

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(a) A series of correspondence, or

(b) Proceedings in a suit other than the one under appeal, should be kept together. It will be seen that the order in the Record of the documents in Part II, will probably be different from the Order of the Index, and the proper page number of each document must be inserted in the printed Index.

The parties will be responsible for arranging the Record in proper order for the Board, and in difficult cases Counsel should be asked to settle it.

4. Numbering the Documents

The documents in Part I. should be numbered consecutively.

The documents in Part II. should not be numbered, apart from the exhibit mark.

5. Heading of Documents

The heading to each document should consist of the number or exhibit mark and the description of the document in the Index, without the date.

6. Marginal Notes

Part I.

(a) Where the case has been before more than one Court, the short name of the Court should first appear. Where the case has been before only one Court, the name of the Court need not appear.

(b) The marginal note should consist of the number and the description of the document in the Index, with the date, except in the case of oral evidence.

(c) In the case of oral evidence, "Plaintiff's evidence" or "Defendant's evidence" should appear beneath the name of the Court. The marginal note should consist of the number in the Index and the witness's name, with "examination," "cross-examination" or "re-examination," as the case may be. The date is not required.

Part II.

The word "Exhibits" should first appear.

The marginal note should consist of the exhibit mark and the description of the document in the Index, with the date.

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7. Omission of Formal Documents, etc.

The parties should agree to the omission of formal and irrelevant documents, but the description of the document may appear (both in the Index and in the Record), if desired, with the words "not printed" against it, or, where a large number of documents are omitted, a list of them may be inserted at the end of the Part to which they belong.

A long series of documents, such as accounts, rent rolls, inventories, &c., should not be printed in full, unless Counsel so advise, but the parties should agree to short extracts being printed as specimens.

Rule 18 of the Judicial Committee Rules, 1908, provides: "Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed, shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the index papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to."

Every document should be carefully edited for the printer, avoiding the repetition of unnecessary titles and omitting formal portions.

A skeleton form of Index and Record, which can be adapted to suit individual cases, is annexed.

Privy Council Office,
Downing Street,
London, S.W. 1,
February, 1920.

IN THE PRIVY COUNCIL No. of 19

ON APPEAL FROM THE COURT OF APPEAL OF_____

BETWEEN

A.B._____ (Defendant) Appellant

and

C.D._____ (Plaintiff) Respondent

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Documents	Date	Page
	In the Supreme Court of----		
1	Writ of Summons----------	25th October 1920	
	(Continue proceedings)		
	Plaintiff's Evidence		
11	G. E. Allen----------	9th May, 1921	
	(Continue evidence)		
	Defendant's Evidence		
15	M. Simons ----------	16th June 1921	
	(Continue proceedings)		
25	Judgment ----------	18th July, 1921	
26	Order ----------	18th July, 1921	
	In the Court of Appeal of----		
27	Notice of Appeal----------	25th July, 1921	
	(Continue proceedings)		
34	Application for conditional leave to appeal to His Majesty in Council (not printed).	24th October, 1921	
	(Continue proceedings)		
37	Order allowing final leave to appeal to His Majesty in Council.	1st December, 1921	

EXHIBITS

Exhibit Mark	Description of Documents	Date	Page
	Plaintiff's Exhibits		
P. 1	Draft agreement for lease----	21st June, 1913	
	(Continue List of plaintiff's Exhibits in order of Exhibit Mark).		
	Defendant's Exhibits		
D. 1	Letter, Plaintiff to Defendant----------	18th June, 1913	
	(Continue List of Defendant's Exhibits in order of Exhibit Mark).		

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IN THE PRIVY COUNCIL No. of 19 .

ON APPEAL FROM THE COURT OF APPEAL OF_____

BETWEEN

A.B._____ (Defendant) Appellant

and

C.D._____ (Plaintiff) Respondent

RECORD OF PROCEEDINGS

No. 1
Writ of Summons

(Continue Proceedings)

No. 11
Evidence of G. E. Allen

Cross-examined

Re-examined

In the Supreme Court (1)

No. 1
Writ of Summons
25th October, 1920 (2)

Plaintiff's Evidence (1)

No. 11
G. E. Allen,
Examination (2)

Cross-examination (2)

Re-examination (2)

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(1) This should only be inserted in the draft Record against the first document to which it refers, with a note to the printer "shoulder note for Nos. to ."

(2) This should only be inserted in the draft Record at the commencement of the item to which it refers; the printer will continue it to the end of the item.

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	Defendant's evidence (1)
(Continue Plaintiff's Evidence)	
No. 15 Evidence of M. Simons	No. 15 M. Simons Examination (2)
Cross-examined	Cross-examination (2)
Re-examined	Re-examination (2)
(Continue Defendant's Evidence) (Continue Proceedings)	
In the Court of Appeal (3)	
No. 27 Notice of Appeal, 25th July, 1921 (4)	No. 27 Notice of Appeal
	(Continue Proceedings)
No. 34	No. 34 Application for conditional leave to appeal to His Majesty in Council, 24th October, 1921. (Not Printed)

(1) This should only be inserted in the draft Record against the first document to which it refers, with a note to the printer "shoulder note for Nos. to ."

(2) This should only be inserted in the draft Record at the commencement of the item to which it refers; the printer will continue it to the end of the item.

(3) This should only be inserted in the draft Record against the first document to which it refers, with a note to the printer "shoulder note for Nos. to ."

(4) This should only be inserted in the draft Record at the commencement of the item to which it refers; the printer will continue it to the end of the item.

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No. 37
Order allowing final leave to appeal to His Majesty in Council 1st December, 1921 (4)

(Continue Proceedings)

No. 37

Order allowing final leave to appeal to His Majesty in Council.

EXHIBITS

Exhibits (5)

P. 4
Letter, Plaintiff to Defendant, 20th August, 1912 (4)

P. 4—Letter. Plaintiff to Defendant.

D. 12
Letter, Defendant to Plaintiff, 22nd August, 1912 (4)

D. 12—Letter, Defendant to Plaintiff.

(Continue Exhibits which should be arranged as directed for Part II, Section 3.)

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(4) This should only be inserted in the draft Record at the commencement of the item to which it refers; the printer will continue it to the end of the item.

(5) This should only be inserted in the draft Record at the commencement of the Exhibits, with a note to the printer "shoulder note to end of end of the item.

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A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN

THE COURT OF APPEAL

AND

THE COURT OF KING'S BENCH FOR MANITOBA

Accident

See NEGLIGENCE.

Agreement of Sale

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Agency

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